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A TREATISE ON THE RIGHTS AND PRIVILEGES GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

BY

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GENERAL

PREFACE.

As the author has observed through many years, it is almost daily, in the federal and state courts, that the Fourteenth Amendment to the Constitution of the United States is appealed to. All those, whether citizens or denizens, who are, or allege themselves to be, unjustly affected in the great rights and privileges and immunities of citizenship, life, liberty, property or equality, invoke that Amendment for their safety and shield against the action of officers and courts under state authority, and against federal governmental authority as forbidden by like principles found in the Fifth Amendment. More particularly is this so where those cardinal rights are prejudiced by the exercise of public authority by the tribunals or officers of the states, or their municipalities; then the federal courts are called upon to assert their jurisdiction for the vindication of those rights guaranteed against state infraction by the Fourteenth Amendment. The supreme importance of that Amendment, from its presence in the federal Constitution, with its paramount obligation, is at

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once evident in theory and practice. This importance is not waning, but growing. Cases under it encumber the dockets of our courts. Under these circumstances it occurred to the author that a work issuing thirty-three years after the adoption of that Amendment, giving decisions upon it of the United States Supreme Court and other national and state courts down to February, 1901, would be of practical value.

The Fourteenth Amendment is, to a limited extent, discussed in works upon general constitutional law; but there is no work specially devoted to it and the decisions construing and applying it. As its title will suggest, the volume is not one covering the whole compass of constitutional law. It is confined to the Fourteenth Amendment; but it incidentally touches kindred subjects, such as the provisions of the national Constitution as to interstate commerce, and against impairment of contracts by state legislation. It deals only with the first and fifth sections of the Amendment, as its other sections concern matters having no relevancy to those of the first and fifth sections, since those other sections concern representation in the Congress, eligibility to office and public debts. But the sections which are discussed embrace a wide and spacious field. It includes Rights, Privileges, and Immunities of Federal Citizenship, Naturalization, Life, Liberty, Prop-

erty and Equal Protection of the Laws; Due Process of Law; the relations and respective powers of the nation and states under the Fourteenth Amendment; the relative functions of national and state courts; the force and effect of state decisions in federal courts; the jurisdiction of the Supreme Court of the United States over the supreme courts of the states for the enforcement of that Amendment; the powers of federal courts over state courts by removal of causes and habeas corpus to enforce the Amendment; the effect of overruled state cases in federal courts; the powers of the states as to police, taxation and eminent domain, as affected by the Fourteenth Amendment, and the right of restraint by the nation over the states therein; the restrictions that may be imposed upon monopolies and trusts and combinations; the power to restrain by injunction strikes and boycotts, called "government by injunction"; the subject of exclusive charters and grants by states and municipalities as fostering monopolies, and how far such charters and grants are contracts inviolable; the rights of naturalization and expatriation; the power of the United States to acquire, hold and govern foreign territory, and under what principles such government must be—whether "the constitution follows the flag" into such territory when acquired; and many other incidental and cognate subjects.

It is hoped, as it has been the author's intention, that the letter and spirit of the book are broad and national, wholly unsectional, inculcating in the breasts of the people patriotic love and devotion to both the Union and the States, teaching the just rights of both, and impressing that the one can not exist without the others and accomplish the manifest destiny which our fathers foresaw, and answer the grand behests of free republican government—Liberty under Law, Happiness, Peace, Progress, Civilization and National Greatness.

In the preparation of the work I have received great and valuable assistance from my son Edward A. Brannon.

HENRY BRANNON.

Weston, W. Va., *February,* 1901.

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INTRODUCTION.

NO apology is needed for offering to the public a work on The Fourteenth Amendment to the Constitution of the United States, the most important of all the additions made to that great instrument. That amendment speaks principles of free government of overruling import. True, these principles are not new; they are but the principles of Magna Charta. They had already been incorporated into the constitutions of the states before the advent of that amendment; and they had been put into the federal Constitution by the Fifth Amendment; but that amendment restrains the powers of the national government only, and until the Fourteenth Amendment came there was no power in the Nation to coerce the states to grant and observe the rights of Magna Charta to their people; the states could grant or deny them. The supreme importance of the Fourteenth Amendment thus lies in the fact that it does compel the states to concede those rights, else the national power can be invoked to coerce their concession. The Fourteenth Amendment thus wrought wonderful change in the governmental relations between states and nation, we may say in the governmental fabric almost; it vastly increased the national power over a large field, and correspondingly decreased the sovereign or final power

of the states. It is this fact, not simply the principles themselves of the amendment, that causes it to mark a new era, a new departure, in American government. It can not be too well understood or discussed. To show its vast practical importance we need only turn to the index head "Constitutional Law" in the reports of federal and state courts and see how those courts are burdened with cases involving that amendment. More and more every year that amendment is invoked in state courts, and more still in federal courts, to challenge the action of state governments. The reports teem with cases upon it. The present work treats of that amendment as it bears upon National Citizenship, Naturalization, Privileges and Immunities of Citizens of the Republic, Life, Liberty, Property, Equal Protection of the Law as affected by unwarranted State Action, Due Process of Law, Police Power, Taxation, Eminent Domain, and kindred subjects. I have endeavored to refer to the main decisions upon the amendment, state and federal, particularly those of the Supreme Court of the United States, as its jurisdiction is final in such cases. It will be seen that much of the work is literal quotation from the opinions of the courts. I have purposely adopted this course, preferring to give the deliverances of the courts themselves in their own words, rather than a construction or version of my own.

The following pages will fully sustain the statement that the Fourteenth Amendment has vastly widened the powers of the Nation over the States. It has "centralized" the government, to use the expression of those who, in the formation of the Constitution and in the many and continuous subsequent contestations upon its construction, op-

ta? The only question is, or was, whether their concession should be left to the states ultimately and finally, or their guaranty and vindication be left ultimately and finally to the nation, as under the Fourteenth Amendment. That question is not before us; the adoption of that amendment has relegated that question to the past. The amendment is here. It has been with us for thirty-two years; a generation has not seen it mar the harmony of the nation and the states. The Supreme Court has applied it with such even, impartial and temperate hand, between States and Nation, that no collision has occurred. May it be ever so. The states are not aliens and enemies of the nation; the nation not alien and enemy of the states. We are all one in the procession of time and progress. What matters it by which government the powers of administration happen in distribution to be exercised, so they are administered "by the people, through the people and for the people?"

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RIGHTS AND PRIVILEGES UNDER THE FOURTEENTH AMENDMENT.

Chapter 1.

FOURTEENTH AMENDMENT.

"SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

"SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

We can not conceive of principles of constitutional law more important and grave, especially as part of the Constitution of the United States, than those embodied in the above sections of its Fourteenth Amendment, both because

they are a direct guaranty and assurance by the federal government of the greatest rights to citizens and persons, and because they deeply concern the relation of the nation to the states, and may produce the most perilous conflict and clash between them. These principles are in themselves old, dating from Magna Charta, granted by King John in 1215, and found in all the American state constitutions; but it was left to the states to vindicate them—the states were supreme as to them—and never, until the 28th of July, 1868, when this amendment went into force, did the federal government undertake the guaranty of the rights contained in it. True, the Fifth Amendment does say that no person shall "be deprived of life, liberty or property without due process of law"; but this operates only on the national government, not on the states. It is exclusively the Magna Charta restraining the federal government.[1]

Whether we test the matter by the rigid construction of the federal constitution given it by that school claiming the largest right for the states, or by the school giving a more liberal construction in favor of the federal government, or even of a third class, which may be called the school of latitudinarians, in favor of the power of the federal government; whether we follow Calhoun, Madison, Jefferson, Stephens and Davis, or Washington, Hamilton, Story, Marshall, Kent and Webster, the United States possessed no such power of restraint upon the governmental action of the States as that conferred by the Fourteenth Amendment. We can not say that it is an

[1] Spies v. Illinois, 123 U. S. 166.

invasion[2] of the rights of the States, because it was adopted by them; but a change, a vast innovation upon the former law, it plainly is. As Justice Swayne said in the Slaughter House Cases,[3] it "trenches directly upon the power of the states, and deeply affects those bodies." We can not under it ask the question, Where is the dividing line between state and national power? as in other cases we may; for there is no *dividing* line. The question in a case is, Has the State gone beyond its powers? Has it deprived one of privilege, immunity, life, liberty or property without due process, or deprived him of the equal protection of the laws? Has it withheld from him what its own law properly applied would assure to him?

The rights thus guaranteed by the national government are obviously just rights, those which ought to be accorded by every free government, and can not be too firmly secured. All admitted this when the amendment was being debated; but the question at issue was whether the guaranty should be left exclusively to the states or to the nation also. The proposition of its adoption elicited great acrimony and difference of opinion as to its necessity and expediency. Mr. Pomeroy, writing while it was in debate, considered it the most important of all the amendments, except only the Thirteenth. He said: "It would give the nation complete power to protect its citizens against local injustice and oppression, a power which it does not now adequately possess, but which, beyond all doubt, should be conferred upon it. Nor would it interfere with any of the rights, privileges and func-

[2] *Ex parte* Va. 100 U. S. 346.

[3] 16 Wall. 125.

tions which properly belong to the states." He thought that, as the Constitution had from its origin prohibited the states from passing attainders, *ex post facto* laws and laws impairing the obligations of contracts, it was strange it had omitted to protect, from its beginning, life, liberty and property against adverse state action by the requirement of due process.

In the view of many of its advocates this amendment may be appropriately called, not Magna Charta, but Maxima Charta, since it not only guarantees great cardinal rights essential to life, liberty, property and happiness, but gives their ample defense into the hands of the Great Republic wherever assailed, and thus enables the American citizen when in peril to say "I am an American citizen" as the ægis of his safety, just as Cicero said a Roman citizen might save himself anywhere within the bounds of the Roman Republic or its colonies or dependencies by the plea "*Sum Romanus civis.*"

In the discussion of this amendment it was argued that the fundamental rights protected by it ought to be defended in one state as in another throughout the republic, and that the republic should possess this corrective, defensive power. On the other side, it was argued that if a state is a government with any sovereign rights it should have power to pass finally upon even the life, liberty and property of its citizens, else it would be practically no government with such essential powers lopped off. The early amendments betray a fear then existing of inordinate power in the nation. This one evinces the opposite fear, that of too little power in the Nation and the violation of the rights of person by the states. The oppo-

nents of this amendment contended that it was a dangerous enlargement of national power and limitation of state power in most vital respects; that it would be wrong to commit to the federal government, in addition to the power which it already had to restrain the states from passing attainders, *ex post facto* laws or laws impairing the obligations of contracts, the further extension of power to restrain the states in the many additional functions as proposed in the amendment; that it proposed federal jurisdiction in most vital matters theretofore left with the states—bore on their action as to privileges, immunities, life, liberty, property and equality before the law, detracted from the sovereignty and dignity of the states, subordinated them to the federal government in a vastly wider field than before, centralized the federal power, giving it a chart of power whose domain, under liberal or free interpretation, could not be even surmised in advance. They said that it did not follow that because the power had been given to restrain the states from attainders, *ex post facto* laws and the impairment of contracts, it was necessary to deprive the states of the right in their administration of government to pass final judgment upon the rights of their citizens and give supervision of such matters to the nation. The actual enlargement of federal control given by this amendment by even conservative construction is unquestionably great.[4] When we reflect how large a part of state governmental action bears upon privileges, immunities, life, liberty, property and equality before the law, and add the prohibition

[4] Reno on Non-Residence, §237.

against attainders, *ex post facto* laws and laws impairing the obligation of contracts, in all of which the federal government has now a final voice, we see how large a part of state administration is committed, in the last resort, to federal control and supervision. Many cases in federal and state courts will attest this. The extension of federal jurisdiction which has been claimed under this amendment, and will continue to be claimed, is shown by Justice Miller in Davidson v. New Orleans, saying that the Fifth Amendment, restraining federal authority without due process, though nearly a century old, had scarcely ever been invoked in the federal courts, whereas the Fourteenth Amendment had filled the docket of the Supreme Court with cases seeking in that court to overthrow judgments and legislation of states, and that there existed "a strange misconception of the scope" of the amendment, and that it seemed that every unsuccessful litigant in a state court had appealed to it to bring his abstract opinions of the justice of state decisions and legislation before the Supreme Court. He condemned such a construction of the amendment, it is true, but his remarks show the latitudinous construction placed by many upon this amendment.[5] "The Fourteenth Amendment did not radically change the whole theory of the relations of the state and federal governments to each other and of both governments to the people," said Fuller, Ch. J.[6]

Any discussion of the expediency of the adoption of the Fourtenth Amendment is now irrelevant, because a dead issue. The amendment is a part of the Constitu-

[5] 96 U. S. 97.

[6] *In re* Kemler, 136 U. S. 436.

tion. Though its principles are antagonistic to the opinions of men of all shades of opinion who took part in the formation of the original Constitution, it has likely come to stay. Whether the change shall prove a blessing or a misfortune; whether it shall operate, as it was intended, to further assure the essential and imprescriptible rights of the citizen, or be the source of friction and clash between nation and states, which will mar the harmony of our wise dual system of government, remains for the future to reveal. Large responsibility here rests with the federal government, particularly its judiciary. So far, that exalted and impartial tribunal, the Supreme Court of the United States, has so temperately construed and applied the amendment that no bane has resulted from it. The claim for excess of federal intervention has hitherto been defeated by the ability and moderation of that illustrious court; but what dangers may lurk within the amendment and find success in changing time and circumstances we can not now foresee. Still, we may reasonably say that the great precedents and bounds already set by that court will reduce these dangers to a minimum. The author humbly ventures to say that for the harmony of the Union, The Ship of State, with which go "our hearts, our hopes, our prayers, our tears, our faith triumphant o'er our fears," the federal judiciary should use this grant of power with caution and prudence, resolving all doubt that is reasonable in favor of the validity of state action.

The past has brought no harm from it, but, in the language of Cicero, *"Tempora mutantur et mutamus in illis."* Other presidents and judges will come to sit in the chairs.

Every patriot will trust that this amendment will not, like Dead Sea fruit, turn to bitter ashes on the lips, or be the box of Pandora, giving forth innumerable serpents to sting; but that it may be a cornucopia of freedom and peace, pouring out in plenty the just rights of the citizen, as well as the stranger within our gates, for it comes with its benison to that stranger as well as to the citizen. The box of mythology contained Hope.

The Fourteenth Amendment is the child of the great Civil War, which desolated our land from April, 1861, to April, 1865. That war and the Thirteenth Amendment abolished chattel human slavery centuries old, existing in fifteen states at its opening. It set free four millions of slaves. It was feared that they would, from the prejudices of the past, be denied by those states their legal rights. The amendment was designed to vest a power in the nation to guarantee those rights when denied by the states. This was the immediate occasion of the birth of the Fourteenth Amendment; but its language is broad, applying to all citizens and persons, "without regard to race, color or nationality."[7] In the Slaughter House Cases[8] it is said that as the main purpose of Amendments Thirteen, Fourteen and Fifteen was the freedom of the African race and protection and security of its rights, that fact should be kept in view in their construction. We do not see how this consideration can expand or restrict the application or elucidate the meaning of Amendment Fourteen as a charter applying to all alike, a citadel of safety for the rights of all for all time. That

[7] Yick Wo v. Hopkins, 118 U. S. 356.

[8] 16 Wall. 36.

great case opened the judicial construction of these last three amendments, and the several able opinions in it serve to illuminate them. We can not help feeling that the decision of the majority was born of a commendable disposition not to give too wide a construction of the powers of the federal government under this amendment.

The amendment is before us. The only question is its construction. Turning now to its first section, let us take up its specific provisions.

WHAT DOES THE AMENDMENT DO?

It is plain from its language that it is only a *restraint* on state power, except that feature relating to citizenship. It *creates* and *originates* nothing new, except power in the federal government to restrain state action. It *creates* no new privileges or immunities of citizens, no new right of life, liberty or property, no new process of law. It only guarantees rights pre-existing, or those which law, national or state, may after its date confer.[9]

IT DOES NOT DEFINE.

The amendment confers citizenship on certain persons, but does not define citizenship, its rights, privileges and immunities. It defends the citizen or person against state governmental action, abridging privileges or immunities, or depriving him of life, liberty or property without due process, or denying him equal protection of the

[9] *In re* Kemler, 136 U. S. 436; Minor v. Happerset, 21 Wall, 162; Hurtado v. California, 110 U. S. 537.

laws; but it does not define privileges, immunities, life, liberty, due process or equality before the law. It is definite, but not definitive. We have to look elsewhere—to the general law of the land—to obtain definitions of all these things.[10] It is not within the field or design of this work to give these definitions. Many other works cover that field. The purpose of this volume is not to say to what cases Section 1 of Amendment Fourteen applies, either by specification or the attempt at formulation of general rules, but to outline the general mission of that section, so far as illustrated as yet by authoritative decision. It is the author's design not to make the volume large; but as many of the authorities to be referred to are not accessible in many places, he will feel justified in making copious extracts from decisions, which may enlarge the volume beyond his present expectations.

[10] U. S. v. Wong Kim Ark, 169 U. S. 696.

Chapter 2.

CITIZENSHIP.

Before this amendment it was contended by Mr. Calhoun and many other able men who were the advocates of the sovereignty of the states, that there was no federal citizenship *in se;* that the Constitution had not conferred of its own force any federal citizenship, and that it was only where a person was a citizen of a state, under its laws, that he became from that fact alone a citizen of the Union. It seems, however, reasonably clear that this was not so. Naturalized persons were surely citizens of the Union by reason of naturalization under the federal statute enacted in pursuance of the provision of the Constitution giving Congress power to pass uniform naturalization laws, and white persons born within the territory and allegiance of the Union were surely its citizens by reason of the common law doctrine that "natural born subjects are such as are born within the dominion of the Crown of England, that is, within the ligeance, or as it is generally called, the allegiance of the king, and aliens such as are born out of it. Allegiance is the tie, or *ligamen*, which binds the subject to the king in return for that protection which the king affords the subject." [1]

[1] 1 Bl. Com. 366; Minor v. Happersett, 21 Wall. 162, 167.

If the common law would not do this, then the general law of nations would do so.[2] I later meet a case, so settling the matter.[3] However, the amendment renders this point immaterial by reason of its own *creation* of citizenship. The amendment only declares as to citizenship what was law before, except as to Africans.[4] Their birth in the United States did not make them citizens under Dred Scott Case.

What is Citizenship?—It is hard to define. He is a citizen who owes allegiance to a government and is entitled to its protection at home or abroad, not a mere denizen or inhabitant. A mere passenger through a country, or even an inhabitant, owes obedience to its laws while in it; but he is not a citizen, as he does not owe technical allegiance. Indians are not citizens.[5] One may be a citizen, yet not a voter, or capable of becoming a voter, as women, children and Indians.[6] To be a citizen one must be a member of the state or nation, capable of enjoying its sovereignty, its highest rights, privileges and immunities—a part of its fabric.[7]

[2] Vattel, Law of Nations, 101; State v Hunt, 2 Hill (s. c.), 1; 2 Kent, 37, 42.

[3] U. S. v. Wong Kim Ark, 169 U. S. 658.

[4] *In re* Look Tin Sing, 21 Fed. 905; U. S. v. Wong Kim, 169 U. S. 676.

[5] Elk v. Wilkins, 112 U. S. 94.

[6] Minor v. Happersett, 21 Wall. 162.

[7] Same case; Scott v Sandford, 19 How. 393; U. S. v. Cruikshank, 92 U. S. 542.

WHO ARE CITIZENS?

The first clause of the amendment answers. It confers the boon of citizenship on every person born or naturalized in the United States, so he be subject to its jurisdiction. He is a citizen of the republic and of the particular state wherein he resides. Whether born in a state or territory, he is a citizen. It applies to both sexes. A woman is a citizen as well as a man.[8] Also children. Being a citizen, he is entitled to all the rights, privileges and immunities of a citizen of the republic and of his state. It is clear that an alien, though resident here, must be naturalized to receive citizenship, as the word "naturalized" shows that the provisions of the original Constitution giving Congress power to establish a uniform rule of naturalization, and the acts under it are left in full force. Notice that mere birth or naturalization gives national citizenship, but to be a citizen of a state a person must reside therein. If born or naturalized in the United States anywhere, and resident in any state, he is a citizen of that state, without its consent, and entitled to the rights of state citizenship, whatever they are. This was the law before the amendment.[9] The case cited holds that if the supreme court of a state denies right under federal citizenship, the federal supreme court may reverse its decision.

[8] Minor v. Happersett, 21 Wall. 162.

[9] Ch. J. Fuller in Boyd v. Nebraska, 143 U. S. 159; Towles Case, 5 Leigh, 743; Slaughter House Cases, 16 Wall. 73; U. S. v. Cruikshank, 92 U. S. 542.

STATE AND NATIONAL CITIZENSHIP.

As just stated, one must reside in a state to be a citizen of that state, but not so with national citizenship. One may still be a citizen of the nation though resident abroad. The amendment does not require continued residence for national citizenship, as it does to retain state citizenship under the amendment.[10] Once a citizen, he continues such, though no longer resident in the United States, but traveling abroad, and is entitled to protection as a citizen until he renounces citizenship by expatriation; for the statute says that "all naturalized citizens of the United States while in foreign countries are entitled to and shall receive from this government the same protection of person and property which is accorded to native-born citizens." U. S. Rev. St. §2000.

EXPATRIATION.

Federal citizenship is lost by expatriation; the citizen by it becomes an alien, and loses all rights adhering to him as a citizen, and is released from his obligations as such.[11] The English common law sternly denies this right of expatriation. Once a native born citizen, always such until death. He can not by swearing allegiance to another country and abjuring his own release himself from the bond of his allegiance.[12] This doctrine has been admitted by the American courts as law at one time in this coun-

[10] Slaughter House Cases, 16 Wall. 74.

[11] Santissima Trinidad, 1 Brock, (U. S.) 478.

[12] 1 Bl. Com. 369.

try;[13] but at a later period the American contention in favor of the right of expatriation obtained in this country. The prevalent doctrine is that a denial of the right of expatriation is a restraint upon human liberty and happiness, denying to a person the right to emigrate and abandon his native country, and against the liberty of the Roman law, and contrary to American principles. Cicero in his orations highly eulogized this feature of the Roman law. The United States fought with Britain the war of 1812 to sustain the right of expatriation and protect naturalized citizens. Chancellor Kent thought that the right of expatriation could not be exercised without the consent of the government; but this was manifestly against our own doctrine as contended for in the war of 1812 and inconsistent with our naturalization law. Though a good many decisions cited by Chancellor Kent would seem to sustain him,[14] his position was untenable.[15] It was bad law before the Act of the 27th July, 1868,[16] allowing expatriation.

That act reads as follows: "Whereas the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty and the pursuit of happiness;

"That any declaration, instruction, opinion or decision of any officer of the United States, which denies, restricts, impairs or questions the right of expatriation, is declared inconsistent with the fundamental principles of the re-

[13] Talbot v. Jansen, 3 Dall. 133; U. S. v. Gillies, 1 Pet. C. C. 159.

[14] 2 Kent, 49.

[15] *In re* Tin Sing, 21 Fed. R. 905.

[16] U. S. Rev. Stat. §1999; Jens v. Lands, 84 Fed. 73; Alsberry v Hawkins, 33 Am. Dec. 546.

public."[17] This broad declaration is an emphatic recognition by the United States of the right of expatriation, although it has been questioned by some whether it settles the controverted question of the right of an individual, by his own mere act, without his government's consent, to expatriate himself. This doubt is made, because the act merely recites a principle; but this doubt is surely untenable in the face of the plain recognition of the right of expatriation contained in said act, notwithstanding the act does not specify any mode of expatriation or what amounts to expatriation.

The government by this act admits the right and consents to it, and we think it concedes that the mere act of the party can effect expatriation. What acts effect it is left to the open law, and the subject will not be entered upon here further than to give the general definition: "Expatriation is the voluntary renunciation of one's nationality by becoming a citizen of another country."[18] Perhaps the question is not one of great importance; still it may be. A citizen who goes abroad and helps our enemy in war, thinking he has expatriated himself, and returning here is indicted for treason, would be deeply interested in having the act of Congress construed as giving the government's consent to his expatriation; and also have, what he has not, a statutory definition or formula of expatriation; but it would perhaps be dangerous and impracticable to say in advance by legislation what acts constitute expatriation, as we can imagine very

[17] U. S. Rev. Stat. §1999.

[18] Santissima Trinidad, 1 Brock. (U. S.) 478; *in re* Look Tin Sing, 10 Sawyer, 355, 21 Fed. 905.

many acts in the conduct of the party. It was once law that as a man can be a citizen of two sovereigns at the same time, he could expatriate as a federal citizen, and remain a state citizen, if the state laid down a process of expatriation not complied with;[19] but as the amendment defines both citizenships, and residence is a necessity for state citizenship, I think that acts that work expatriation of federal would work expatriation also of state citizenship.

Desertion from the military or naval service, with departure from the United States, operates as a forfeiture of citizenship.[20]

Loss of State Citizenship.—As above stated, though a citizen of the United States may be residing abroad, yet he retains his federal citizenship, unless he expatriates himself; but mere residence abroad loses his state citizenship. Of course his residence abroad, to effect this result, must be *animo manendi,* not transient residence, but residence in the sense of domicil.

State Citizenship Only.—Can a state confer its citizenship upon one not a citizen of the United States? The Dred Scott case, before the amendment, says it can. The amendment contemplates two classes of citizens. A man may be a federal citizen, but not a state citizen, as just stated; but can he be a state citizen and not a federal citizen? This seems unsettled. It is doubtful whether he can be. True, the amendment seems to have for its mission, first, to make native and naturalized citizenship, and

[19] Talbot v. Jansen, 3 Dall. 133; Murray v. McCarty, 2 Munford, 393.

[20] Rev. St. §1998.

second, to make federal citizens, if resident in a state, citizens of that state and give them rights as such;[21] but it does not seem to go further, or expressly deny the right in states to confer their separate citizenship. We do not clearly see why a state might not do so; but it would seem to be very anomalous that a man should be a citizen of the state and not of the Union, especially as the power of naturalization is committed to the federal government, and a state can not naturalize, and as this amendment makes a federal declaration of citizenship, and would seem to confer the whole matter of citizenship upon the national government. It would seem that the amendment intends to give a full definition of both state and federal citizenship, and that no one not coming within its definition can be a citizen of either the United States or a state. Therefore, as stated above, the permanent residence abroad, which would amount to expatriation and decitizenize a citizen of the Nation, would likewise take away his state citizenship. The doctrine once held that a man might lose his federal and retain his state citizenship, because not complying with the formality for expatriation prescribed by state statute, would seem no longer to apply.[22]

This right of sole state citizenship is denied by some authorities.[23]

Native Citizens.—The amendment says that all persons born in the United States are citizens, if subject to the

[21] Slaughter House Cases, 16 Wall. 36.

[22] Talbott v. Jansen, 3 Dall. 133; Murray v. McCarty, 2 Munford, 393.

[23] Lanz v. Randall, 4 Dill. 425; approved in Minneapolis v. Reum, 12 U. S. App. 446; Prentis v. Brennan, 2 Blatch. 162.

jurisdiction of the United States. Mere birth within our territory does not always make the child a citizen. He must be born under the allegiance of the United States. A child may be a citizen, though born without the United States, if born under its allegiance, as, for instance, the child of a citizen traveling abroad, or temporarily resident abroad, yet intending to return; or a child of an American minister, consul or the attachee of an American embassy; or a child born on an American ship in foreign waters of American parents. In such cases the status of the child is to be tested by his lineage or extraction, not by the locality of his birth. We repeat that mere birth within American territory does not always make the child an American citizen. He must be born within allegiance to the United States, within its "jurisdiction." Such is the case with children of aliens born here while their parents are traveling or only temporarily resident, or of foreign ministers, consuls and attachees of foreign embassies. Such children are born within our territory, and within our territorial jurisdiction, but not within the pale of allegiance to us, as when born they are not subject to our laws. Children born here of foreign representatives are, under international law and common law, born within the allegiance of the countries sending them; such representatives are still citizens of their own countries, owing allegiance thereto. For this purpose their houses are the territory of their countries. Such representatives have transient residence here, not permanent domicile. So with children of aliens born on foreign ships. The foreign ship, though in our waters, is foreign territory for this pur-

pose.[24] Child born abroad of parent temporarily abroad is a native citizen, even if mother an alien.[25]

Children Born Abroad.—Suppose an American citizen, native or naturalized, not temporarily absent, but domiciled abroad, have children born abroad. Are such children American citizens? They are not, because born abroad and not subject to our jurisdiction. They come under the common law doctrine that all persons, though of foreign born parents, born within the territory of a nation are its citizens, by which rule a child born of alien parents domiciled permanently in the United States is a citizen thereof. True, by Section 4 of the Naturalization Act of 1802, such persons were made citizens; but that section related only to children of persons who were citizens at its date, or had been,[26] and though it may be that some persons yet live who would be citizens under that section, they must be very few in number. If any are yet living, they will soon be gone; so the point is not important. That section would not apply to children of persons once citizens, but expatriated.[27] There is now no statute giving citizenship to children born abroad of American citizens permanently domiciled abroad, because the parents have expatriated themselves. The child follows the father.[28] By Section 1993 of the Revised Statutes all children born out of the limits and jurisdiction of the United States, whose fathers are at their birth

[24] *In re* Look Tin Sing, 21 Fed. 95; *In re* Wong Kim Ark, 71 Fed. 382, 169 U. S. 682; 1 Bl. Comm. 373; Vattel, L. Nations, 102.

[25] Ludlam v. Ludlam, 26 N. Y. 356; 84 Am. D. 193.

[26] 2 Kent. 52.

[27] Brown v. Dexter, 66 Cal. 39.

[28] Ludlam v. Ludlam, 26 N. Y. 356, 84 Am. D. 193.

citizens of the United States, are declared to be citizens of the United States, with the proviso that citizenship shall not descend to children whose fathers never resided in the United States. We think that is simply declaratory of the general law. It refers to the children of fathers who have not ceased to be citizens by permanent domicile abroad, to fathers yet continuing citizens, who have the intention to return home. Our admission of the right of expatriation would forbid a wider construction. It is supposed that the child of an American mother born to her while she was abroad, she still a citizen, would be a citizen of the United States, and she being at the birth a single woman, as we do not suppose that the presence of the word "fathers" in the act, would prevent such child of such mother from being a citizen. If the father be living, however, at the child's birth, and he an alien, and the mother a citizen of the United States, the child would be an alien. Ludlam v. Ludlam, 84 Am. D. 193, and note.

Children born abroad of citizens temporarily abroad, though born abroad, are citizens because "subject to the jurisdiction" of the United States, in the same sense as children of ambassadors, and thus under the amendment are citizens, as they surely would have been before it. The amendment is only declaratory of antecedent law of native citizenship, except as to Africans, by limitation of the Dred Scott Case. Such children when of age may elect the citizenship of birthplace.[29]

Alien Children of Aliens.—An alien child of an alien is, of course, an alien; but the alien child of an alien

[29] Ludlam v. Ludlam, 84 Am. D. 193, Story, Confl. L. §10; *In re* Tin Sing, 21 Fed. 905; U. S. v. Wong Kim, 169 U. S. 676.

who has merely declared his intention to become a citizen, and dying before final admission to full citizenship, while not a citizen may become a citizen at once by taking the naturalization oath. So with the mother.[30]

The statue does not say infant children; but we presume the right would be confined to them.

Alien Children of Naturalized Parents.—Children born abroad of an alien become at once full citizens by the naturalization of the parent, if then under age and dwelling in the United States, whether the parent be father or mother, single or married.[31] When of age he may elect to take citizenship at the place of birth. Ludlam v. Ludlam, 84 Am. D. 193; Whart. Confl. L. §10.

Alien Women Marrying Citizens, native or naturalized, become by such marriage American citizens, if they themselves could be naturalized.[32] No matter whether the husband became a citizen before or after marriage. If the husband is a citizen, so the wife should be.[33] Her minor children have also been held to become citizens by such marriage.[34]

American Women Marrying Aliens.—It seems they thereby become aliens, if they reside abroad permanently, as our act makes citizens of alien women marrying an American citizen. Marriage and residence abroad show expatriation of the woman.[35] But an American woman marrying an alien, if she continue to reside here, does

[30] Rev. Stat. §2168.
[31] Rev. Stat. §2172.
[32] Rev. Stat. §1994.
[33] Kelly v. Owen, 7 Wall. 496.
[34] Kreitz v. Behrrenmayer. 125 Ill. 141.
[35] Comitis v. Parkson, 56 Fed. 556; Ruckgaber v. Moore, 104 Fed. 947; Shanks v. Dupont, 3 Pet. 242.

not lose citizenship.[36] Minor child of alien woman marrying a citizen becomes a citizen by §2172, according to Gum v. Hubbard, 10 Am. St. R. 312.

Native Children of Aliens.—Children born in the United States of alien parents, not temporarily resident here, but permanently domiciled, are American citizens, whether the parents be Chinese or other nationality.[37] This was law before the amendment, and is so under it. It was common law.[38] Women may be naturalized, Priest v. Cummings, 16 Wend. 617; Brown v. Schilling, 9 Md. 82.

Indians.—They are born within the American jurisdiction and territory, or rather territorial jurisdiction, and might seem to be citizens; but so long as they acknowledge allegiance to their nation or tribe, acknowledge their chief, they are not citizens of the United States. The Indian, though born here, does not fill the other elements of definition of citizenship—he is not "subject to the jurisdiction" of the nation in the particular sense of owing that full obedience, allegiance and submission to the laws owing from citizens generally. He is an exception, one *sui generis*.[39] Revised Statutes Section 1992, gives a very accurate description of natural citizenship: "All persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are declared to be citizens of the United States." Thus, Indians are citizens if taxed it would seem—otherwise not. Taxation makes them citizens under that act regardless of continued tribal

[36] Pequignot v. Detroit, 16 Fed. 211; Beck v. Magillis, 9 Barb. 35.

[37] Lynch v. Clark, 1 Sandf. Ch. 584.

[38] *In re* Wong Kim, 169, U. S. 696; Lem Hing Dun, 7 U. S App. 31.

[39] McKay v. Campbell, 2 Sawyer, 118; U. S. v. Kagama, 118 U. S. 375.

allegiance, a change in instances where there is such taxation.

If the Indian has abjured fealty to his tribe or nation, amalgamated with the people generally by residing separate and apart from his tribe, and adopting civilized life, he is a citizen.[40] Until this act he did not thus become a citizen.[41] The same act makes an Indian a citizen who elects to take an allotment of public land.[42] Indians can be naturalized.[43] The general naturalization law does not apply to them, they not being white, and only special act can naturalize them.[44]

An act of the first session of the Fiftieth Congress, Chapter 818, makes an Indian woman marrying a citizen also a citizen.

A citizen becoming a member of an Indian tribe by adoption does not lose citizenship.[45]

Colored People of African Descent.—By the Dred Scott Case,[46] in 1856, which almost convulsed the nation from the circumstance that the controversy touching African slavery was then producing intense political agitation, which decision subjected the Supreme Court to the severest criticism by the opponents of slavery, it was held that Africans brought to America and made slaves, and their descendants, though free, were not citizens, and that they could not be naturalized as aliens. The slaves were made free men by the Thirteenth Amendment, but under the law

[40] Acts 2 Sess. 49 Congress, Ch. 119.
[41] Elk v. Wilkins, 112 U. S. 94.
[42] State v. Denoyer, 72 N. W. 1014.
[43] Elk v. Wilkins, 112 U. S. 94.
[44] Wilson v. Wall, 6 Wall. 83.
[45] French v. French, 52 S. W. 517.
[46] 19 How. 393.

as given by that case, they were not citizens. They could not become such. They could not be naturalized. One great moving occasion for the Fourteenth Amendment was the purpose to overrule that decision and confer citizenship upon the freedmen. The amendment, by its broad language, effectually does this, making the freedmen citizens, with all the rights, privileges, and immunities pertaining to citizens. Justice Field so held in San Mates v. R. R. Co.[47] There was little or no call for the Amendment as to other people, as its declaration as to their citizenship was already the law; but as to those freedmen, under the Dred Scott Case, if made citizens, it was indispensable to confer citizenship by act of Congress or constitutional amendment, as by that case the freedmen were not nor could become citizens. The nation in its wisdom chose to adopt the amendment, moved chiefly by that purpose. The Civil Rights Act, passed before this amendment, gave these colored people civil rights of person and property, the same as other persons.[48] That act was reenacted in 1870. The naturalization statute did not authorize the naturalization of colored persons, as it required the person asking citizenship to be a white person; but the act of July 14, 1870, changed this by giving to Africans the benefit of the naturalization statute.[49]

African Women Marrying Citizens.—As Section 1994, U. S. Revised Statutes, makes the wife of a citizen, though she be an alien, a citizen without naturalization, if she could herself be naturalized, an African woman becomes

[47] 13 Fed. 722.

[48] Rev. St. §§1977, 1978; Strauder v. West Va. 100 U. S. 303; *Ex parte* Va. 100 U. S. 339.

[49] Revised Stat. §2169.

herself a citizen without naturalization.[50] As the amendment in words requires naturalization, a question might be made as to the constitutionality of that provision, dispensing with naturalization in the case of alien women marrying citizens. It is valid, however, under the case of Dorsey v. Brigham.[51] That provision applies only to a woman marrying a citizen man, not to an alien man marrying a citizen woman.

Mongolians.—These were not considered "white persons," and therefore not entitled to naturalization, even before the act expressly excluding Chinese.[52] The later Chinese Exclusion Act denies them naturalization.[53] Japanese are Mongolians.

Chinese Children.—Those born here of Chinese parents permanently residing here are American citizens by reason of birth here, though their parents are aliens. This is the common law doctrine before stated in these pages, that any one born within the territory and allegiance of the king or country is a natural born citizen. Such children can not be deported or excluded under the act excluding the immigration of Chinese and deporting them under certain circumstances.[54]

Filipinos and Puerto Ricans.—The Philippine Islands and the Island of Puerto Rico have been recently acquired from Spain by treaty. It is supposed that their inhabitants at the time of acquisition are not citizens of the

[50] Brodis v. Brodis, 86 Fed. R. 951, Rev. St. §1994.

[51] 52 N. E. 303. So by Boyd v. Thayer, 143 U. S. 135, §8.

[52] *In re* Ah Yup, 5 Sawy. (U. S.) 155.

[53] *In re* Gee Hop, 71 Fed. R. 274.

[54] 22 U. S. Stat. at large, Ch. 126, §14, p. 261; *In re* Wong Kim Ark, 71 F. 382, 169 U. S. 696; Lem Hing Dun v. U. S., 7 U. S. App. 31; *Re* Look Tin Sing, 21 Fed. 905.

United States. They were not born within the territory and allegiance of the United States, as required by the Fourteenth Amendment, and can not be citizens because of it, and would not be under the common law and law of nations defining natural citizens as those born within the territory and allegiance of a country.[55] The Act of 1802 limited naturalization to "white persons," as does also the present law,[56] and it has been held that Africans could not be naturalized, and further it was held in the United States Circuit Court that a Mongolian was not a "white person" and could not be naturalized.[57] As these decisions limit naturalization to the Caucasian or white race, it is questionable whether a Filipino can be naturalized. Likely not, under those decisions. However, it remains to be decided. Mankind is divided in ethnology into different races. One of these is the Caucasian or white race, another Mongolian, another Malayan. A Filipino is understood to be one or the other of the two latter races; or rather, some of one and some of the other. We do not see how he can be naturalized under the statute as it is. The Act of 1870 specifically brings the African within the naturalization act, but beyond that the words "white persons" still find place in the law and would therefore seem to exclude Mongolians and Malayans. We suppose, however, that Spaniards or others of white blood resident in the Philippine Islands would come under our naturalization laws. We suppose that Puerto Ricans are entitled to naturalization, as they are of either Caucasian or Afri-

[55] 1 Bl. Com. 366; Vattel, L. Nations, 101; 2 Kent, 1; State v. Hunt, 2 Hill, 15.

[56] Appendix, Rev. Stat. p. 1435.

[57] *In re* Ah Yup, 5 Sawy. 155.

can extraction. No doubt, under principle above stated, children of Filipinos born since the acquisition of the islands by the United States would be citizens.[58] But, though the Filipinos are not within the naturalization laws, still they are American freemen, entitled as persons, under the Fifth and Sixth Amendments to the Constitution of the United States, and under the Civil Rights Act and the free spirit of our government, to the personal rights accorded by the benign system of government of the United States.[59] They are subject to our jurisdiction and laws, and from that very fact they are freemen in a free republican government, not subjects of an empire or monarchy. The treaty of peace with Spain did not give the inhabitants of these islands citizenship, but committed the government of them to Congress. Congress must govern them according to principles of American free government. As the treaty conveys the islands to us, we must regard our right as based on cession, not conquest, a consideration repelling all thought of power of imposing arbitrary government on those people.

[58] *In re* Look Tin Sing, 21 Fed. 905; U. S. v. Wong Kim Ark, 169 U. S. 649.

[59] Thompson v. Utah, 170 U. S. 346; Bank v. County, 101 Id., 129.

Chapter 3.

ACQUISITION OF TERRITORY.

The nation acquired these islands by a power inherent in all nations, the power to acquire territory by conquest or treaty, as a necessary implication. A nation without such power would be a nondescript among nations. No matter that the Constitution does not give this power in terms. It gives war and treaty making pawer, national powers. This includes it.[1] It is inherent in a nation. It was strenuously denied once.[2] Even Mr. Jefferson thought that it called for an amendment to the Constitution, though he advised Congress to approve his Louisiana purchase *in silence*, thus tacitly admitting such implied power. But that was in the early days of strict construction of the Constitution, before time, progress and evolution had brought about things now well settled. Washington, Jackson, Jefferson, Polk, Buchanan, Douglas, Lincoln, Marcy, Grant have recognized this power and advocated its policy. Chief-Justice Taney admitted the national power to acquire territory, "not to hold as a colony, to be governed at its will and pleasure," but to be governed as a territory until fit to become a state.[3] This

[1] Insurance Co. v. Bales of Cotton, 1 Pet. 511; Chinese Exclusion Case, 130 U. S. 581; U. S. v. Huckabee, 16 Wall. 434.

[2] Story on Const. §1282.

[3] Dred Scott Case, 19 How. 395.

denies an arbitrary, tyrannical government. Even the power to erect territorial governments has been denied; but the Louisiana, Florida, California and Alaska purchases, and the erection of territorial governments in their territory have long ago negatived those ideas. President Pierce in 1854 made a treaty of absolute acquisition of the Sandwich Islands, which failed only on account of the king's death and the refusal of his successor to approve the treaty. President Grant proposed the purchase of San Domingo, and made a treaty for its acquisition, not ratified by the Senate from motives of expediency. The United States is a nation with all inherent powers as such.[4] Brought thus under national power lawfully, these Filipinos and Puerto Ricans are "persons," "free inhabitants," though not citizens, and entitled under the silent principles of our government to the rights which belong to persons. It is true these people are subject to the power of Congress as to government.[5] Strictly speaking, we can assign no limit otherwise to the power of Congress over the territories except that found in the Fifth and Sixth Amendments, but they bear sway wherever the flag waves over territory within the civil jurisdiction of the United States. Those amendments tie the hands of Congress wherever it makes laws for civil government. Justice Brewer so declared.[6] The Constitution stretched over these islands the moment they became territory of the nation to give them freedom, just as the Thirteenth Amendment abol-

[4] Legal Tender Cases, 12 Wall. 554; Chinese Extra. Case, 130 U. S. 581.

[5] Bank v. County, 101 U. S. 129; Murphy v. Ramsey, 114 U. S. 44; Thompson v. Utah, 170 U. S. 346; American Ins. Co. v. Carter, 1 Pet. 511 ; Scott v. Jones, 5 How. 343; Stewart v. Kahn, 11 Wall. 507.

[6] Fong Yue v. U. S. 149 U. S. 739.

ished slavery at once in Alaska, as held in *In re* Sah Quah.[7] The proclamations of President McKinley have declared and admitted these principles of free government as the right of the Filipinos and Puerto Ricans. He so directed the military commander and the commissioners sent to the Philippine Islands. So this governmental action concedes this doctrine. When Congress shall admit these islands as states, if ever, their people become citizens, because the act of admission would be a collective act of naturalization.[8] This latter point might be admitted as sound before the Fourteenth Amendment, but as a little questionable since, as that amendment declares who are citizens, limiting them to natives or naturalized persons; still it seems that the amendment made no difference in the power to make citizens by treaty or the admission of states.[9]

Aliens may be Totally Excluded by the United States, and treaties admitting them may be repealed so far as their future rights are concerned. It is an inherent and inalienable right of every sovereign nation. Hence we can repeal naturalization laws or modify them as we choose.*

After writing the above I observe that the illustrious Chief Justice Marshall, who stands without a peer in American jurisprudence, and whose judgment very few

[7] 31 Fed. 327. See Capital Traction v. Hof, 174 U. S. 1; Thompson v. Utah, 170 U. S. 343.

[8] Boyd v. Thayer, 143 U. S. 135; Bolln v. Nebraska, 176 U. S. 83, 20 Sup. Ct. R. 287; Contzen v. U. S. 179 U. S. 191, 21 Sup. Ct. 98.

[9] Boyd v. Thayer, 143 U. S. 135; Bolln v. Nebraska, 176 U. S. 83, 20 Sup. Ct. R. 287.

* Chinese Exclusion Case, 130 U. S. 581; Fong Yue Ting v. U. S. 149 U. S. 698; Wong Wing v. U. S. 163 U. S. 228.

would assume to controvert, declared in The Insurance Company v. Canter,[10] that as the government had power to make war and treaties, this carried along also the power "of acquiring territory by conquest or treaty."

In the convention which framed the articles of Confederation, the proposition was made, that "states lawfully arising within the limits of the United States, whether from voluntary junction or otherwise," might be admitted into the Confederation; but it was rejected, and the broad proposition found in Article XII was adopted, that is, that Canada might be admitted into the Union, "but no other colony shall be admitted into the same unless such admission be agreed to by nine states," thus plainly contemplating the further acquisition of territory. Who will deny that the sovereign states, before going into the Union, could have acquired territory by conquest or treaty? Then, can not a nation formed by all the states as fully do so? As strict a constructionist of federal power as was the great constitutional lawyer, John Randolph Tucker, he asserts this power of acquisition of territory squarely in his recent work.[11] I will add that the doctrines enunciated in the Dred Scott Case[12] concede and support this power of acquisition. The present Constitution, Article IV, Section 3, says "new states may be admitted by the Congress into this Union." This contemplates expansion of territory. It could not have been contemplated for all time that states thereafter admitted must necessarily come from territory then owned by the Union.

[10] 1 Peters, 542.
[11] 2 Tucker on Constitu. 605.
[12] 19 How. 393.

And as to the power of Congress to govern, Article IV, Section 3, Clause 2, is all-sufficient. "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory and other property of the United States." This plainly contemplated further acquisition of territory, and gave Congress full power of government over the same. This full power of Congress to govern territory results not only from this clause of the Constitution, but is abundantly sustained by decisions.[13] But such government must be tempered with the guards and protection of personal liberty found in the federal Constitution.[14] Some additional cases are given in the footnote for reference.[15]

The treaty of Paris between the United States and Spain, closing the Spanish-American War, provides that all persons born in the Spanish peninsula, that is, in Spain, resident in the Philippine Islands and Puerto Rico, who should elect to continue to reside in those islands, after a certain time should be deemed citizens of the United States and entitled to all the privileges and immunities of citizens of the United States; but there is no such provision as to the natives of those islands. They are left by the treaty subject to the regulation of Congress. When Congress shall organize a civil or territorial government

[13] Mormon Church v. U. S. 136 U. S. 1, 44; National Bank v. County of Yankton, 101 U. S. 129, 133; Murphy v. Ramsay, 114 U. S. 14, 44; U. S. v. Gratiot, 14 Pet. 533; Cross v. Harrison, 16 How. 180; U. S. v. Kagama, 118 U. S. 380.

[14] Thompson v. Utah, 170 U. S. 343; American Pub. Co. v. Fisher, 166 U. S. 464.

[15] Green v. Biddle, 8 Wheat. 1; Cope v. Cope, 137 U. S. 682; Shively v. Bowlby, 152 U. S. 48; U. S. v. Wong Kim Ark, 169 U. S. 705; Boyd v. Thayer, 143 U. S. 135; Wong Wing v. U. S. 163 U. S. 228; McAllister v. U. S., 141 U. S. 174.

there, I should say that the act of 1850[16] would at once extend over the territory covered by such organized government, the Constitution and the laws of the United States.

I do not assert that while a state of insurrection and rebellion and war exists in those islands, the principles of the Constitution prevail as in peace; but I do say that when peace shall again reign there, the principles of American law for the protection of life, liberty and property will reign there also.

It has been held that the Seventh Amendment, securing trial by jury in common-law cases where the value in controversy is over twenty dollars, applies to the territories, as recognized by the Supreme Court in Black v. Jackson,[17] citing Webster v. Reed.[18] In Reynolds v. U. S.[19] it is stated that the Sixth Amendment to the federal Constitution giving jury trial in criminal cases applies to the territories. In another important case[20] the opinion of the court says: "Doubtless Congress, in legislating for the territories, would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments; but these limitations would exist rather by inference and the general spirit of the Constituton, from which Congress derives all its powers, than by any express and direct application of its provisions."

I should remark here that these rights of persons in the territories, or in the unorganized territory, of the United

[16] Revised Stat. §1891.
[17] 177 U. S. 363.
[18] Webster v. Reed, 11 How. 437.
[19] Reynolds v. U. S. 98 U. S. 54.
[20] Mormon Church v. U. S. 136 U. S. 1, 44.

States, arise from the Sixth and Seventh Amendments, not from the Fourteenth Amendment, because the former amendments bind the nation, while the latter binds only the states; still, as the subject is one of due process of law for the security of personal right, it is germane to the character of this work.

I have no doubt that the conquest of these islands, consummated and ratified by the international contract called a treaty, did convert these islands from foreign countries to non-foreign countries, and did incorporate them into the territory, nationality and jurisdiction of the United States, so as to make them a part of its territory and within its jurisdiction; but they were not like Virginia, original states or republics, and did not, like her, enter into the Union, and did not, like Missouri, enter that Union by congressional admission. These are the only processes by which a state can be a member of the Union. Hence it is impossible to say that these possessions have statehood; but thence it does not follow that they are not a part of the domain and under the jurisdiction of the nation; for, if so, the treaty has no force. It has a legal force; that is, to incorporate those islands, not only into the territorial domain of the United States as a nation, but also into its nationality, its jurisdiction. "By the ratification of the treaty California became a part of the United States."[21] So with these islands. This puts them under the power of Congress, which, under the Constitution, must give free government in form and substance

[21] Cross v. Harrison, 16 How. 164, 191; Loughbrough v. Blake, 5 Wheat. 317.

republican, because our Constitution knows no other in peace. War is an exception. *Inter arma silent leges.*

In a case decided in May, 1900,[22] in the United States Circuit Court of New York, is an able opinion by Judge Townsend, coming to me since the above matter was written, in which the subject is fully discussed upon the question whether the Dingley Tariff Act warrants the charge of duties on imports from Puerto Rico. That act imposes tariff on articles "imported from foreign countries." Is Puerto Rico, since the Paris treaty, a foreign country so as to justify such charge? The court held that the island was by the treaty "acquired," but not "incorporated" into the nation, and hence for this purpose was still a "foreign" country. The reasoning does not seem conclusive. Its basis is largely that of Fleming v. Page,[23] holding that goods from a Mexican port held by our forces in war, but restored to Mexico by the treaty of peace, was for the time land of the United States by conquest, a part of its territory, and yet not so far as to exempt from tariff, and if this is so, why not the same as to Puerto Rico? I answer that one was transient occupation during war, provisional at most; the other possession with legal title under law of war and peace, forever. There is a difference. Congress seems to have taken a different view from Judge Townsend's view, as it passed a temporary tariff act for Puerto Rico. My view is that it is not a "foreign" country under antecedent tariff law, and that to subject it to tariff there must be an express act. Whether Congress can constitutionally pass such act under its power

[22] Goetze & Co. v. U. S. 103 Fed. 72.
[23] 9 How. 603.

to govern territories, or Puerto Rico being a part of the nation, it is prohibited by the provision that "all duties, imposts and excises shall be uniform throughout the United States," is a question not yet decided. It seems to me of doubtful constitutionality; but I venture no final opinion. Judge Townsend, while rendering the above decision, concedes the position above stated by me, that the Constitution does give civil rights to these islanders, that it guarantees them republican government, and that its people are not American citizens. They are not subjects, as if we were a monarchy. Our Indians, though not citizens, are not accounted subjects. A name exactly representing their condition is not at hand. These islanders are people under our nationality and jurisdiction, subject to the government of Congress, which is limited only by the obligation to secure them free republican government and according them civil rights consistent therewith.

Hawaiians can not be naturalized, because not white persons, but Malayans.[24]

But the treaty of annexation makes them citizens.

Burmese, being Mongolians, can not be naturalized.[25]

Corporations are not citizens.[26] Though not citizens, their property rights are protected as if they were persons. They are treated as persons for that purpose under the Fifth and Fourteenth Amendments.[27] They are, however, citizens of the state of incorporation under clause of Constitution authorizing a citizen of one state to sue a

[24] *Re* Kenaka, 21 Pac. 993.
[25] *In re* Po, 28 N. Y. 383.
[26] Paul v. Virginia, 8 Wall. 168.
[27] Covington v. Sanford, 164 U. S. 578.

citizen of another in the federal court,[28] and so far as concerns removal of suits from state to federal courts.[29]

A corporation of one state can not do business in another state, except federal business, without the latter's consent, at least, against its prohibition. It may impose conditions.[30] But a natural person is entitled to do lawful business in his own or another state without such consent, by force of the federal Constitution under the commerce clause, Article 1, Section 8, Clause 3, and Article 4, Section 2.

[28] R. R. Co. v. Whitton, 13 Wall. 270.
[29] Martin v. B. & O. Co. 151 U. S. 673.
[30] St. Clair v. Cox, 106 U. S. 350; Slaughter's Case, 13 Grat. 767.

Chapter 4.

PRIVILEGES AND IMMUNITIES.

We come now to provisions of the amendment of greater importance and more difficult of application than that relating to citizenship. We refer to the prohibition against the states from abridging the privileges or immunities of citizens, or depriving persons of life, liberty or property without due process of law, or denying them equal protection of the laws. What is the meaning of Section 1 of this great amendment as to those matters? This is a difficult question to answer. In truth, no general exact rule can, in advance, be drafted giving its meaning. It would be extremely dangerous for a court to tie itself down to an inflexible rule herein. The general purposes to be subserved seem plain; but application of the provisions to cases can not beforehand be pointed out by any stated rule. Speaking of privileges and immunities the United States Supreme Court has refused to define them in advance, preferring to decide each case as it comes.[1] The Supreme Court has further said that the construction of these provisions must be "a gradual process of judicial inclusion and exclusion," as time goes on.[2]

[1] Conner v. Elliott, 18 How. 591.
[2] Davidson v. N. Orleans, 96 U. S. 104.

Numerous cases under this amendment have blazed the way to a considerable extent, but have not made a broad, clear highway. Its construction is still, after thirty years, in a chrysalis state, in process of evolution, and will long continue to be. Courts may lay down some general principles under it; but they will be only approximately accurate, though very useful in future time. We must apply it to each case as it comes, guided, as far as can be, by prior decisions.

To Whom it Applies.—The amendment applies only to state governmental action. Its first section does not operate upon the federal government, but on that of the states it does; nor does it have any reference to action or conduct of individual to individual.[3] That it is a restraint upon state action is very obvious from its words, they being words of explicit prohibition. "No state shall" do the things prohibited. And Section 5 gives Congress power to enforce the amendment by appropriate legislation. And the Constitution of the United States is the highest law of the land. Thus it is undeniable that the federal government can and should, under this amendment, in proper cases, use all its machinery for the vindication of the rights by it sought to be protected.

Authorities to Enforce Amendment.—It is the duty of the courts and other agencies of state administration to recognize and concede the rights intended to be protected by the amendment, in the first instance, in transactions presented for their action, without waiting for intervention by federal courts, the federal Constitution being the

[3] Civil Rights Cases, 109 U. S. 23; Paul v. Va. 8 Wall. 168; Va. v. Rives, 100 U. S. 318; U. S. v. Cruikshanks, 92 U. S. 542, 95 Fed. 849.

highest law ruling state and federal tribunals. It is prohibitory upon the states to deny those rights, and therefore it is plainly the duty of the courts and other authorities of the state to concede and vindicate such rights where they exist.[4] The right to pass finally on the question whether the state has infracted the amendment lies with the federal Supreme Court.[5]

No New Rights Granted.—As elsewhere stated, the amendment *creates* no rights not existing before it. It originates none. It adds nothing to the catalogue of privileges, immunities, rights of life, liberty or property, or of equality before the law. It does not specify or define any of them. It only defends those rights existing under the law of the land, federal or state, and in being at its adoption, or born of the law afterwards. This is an important consideration in the construction and application of the amendment. It brings nothing new. It adds no privileges. The things it guarantees are old. It is only Magna Charta over again. It only enjoins upon the state, by the voice of the highest law, the duty of regarding and conceding certain cardinal rights, and grants to the national government the power to correct and reverse their plain denial by the action of the state.

This is strongly illustrated by decisions holding that the rights of suffrage and making a living by practicing law are neither granted nor protected by the amendment.[6] What could more strongly show that the amendment gave

[4] Neal v. Delaware, 103 U. S. 370.

[5] Tarble's Case, 13 Wall. 397; Cohens v. Va. 6 Wheat. 264; State v. Sponagle, 45 W. Va. 415, 32 S. E. 283.

[6] Minor v. Happersett, 21 Wall. 162; *In re* Lockwood, 154 U. S. 116.

no new rights than the principle settled by many cases that "due process of law" means the same as the words "law of the land" in old Magna Charta?[7]

[7] Murray v. Hoboken, 18 How. 276.

Chapter 5.

UNITED STATES SUPREME COURT DECIDES FINALLY.

The question naturally arises, Who is to say, finally, whether given action of a state is violative of the Fourteenth Amendment? I answer, the Supreme Court of the United States. Very soon after the adoption of the Constitution arose the questions, Is it with the national or the state judiciary to say whether the Union has exceeded its powers, or whether a state statute is repugnant to the federal Constitution? Has the state or the nation right to answer finally? These great questions engendered an intense, acrimonious discussion, involving vitally the relations of the national and state governments. No graver questions could be put upon the subject. Chief-Justice Marshall did not overdraw when he said, in Cohens v. Virginia,[1] that the fate of the Union hung upon the answer. Very eminent contention was made, no less than resolutions of the Kentucky and Virginia legislatures, called the "Kentucky and Virginia Resolutions of 1798," that the federal government had not right to pass conclusively on the relative extent of federal and state power. The Kentucky resolutions, written by Thomas Jefferson, in

[1] 6 Wheat. 377.

terms said of the federal government that "this government, created by this compact, was not made the exclusive or final judge of the extent of the powers delegated to itself, since that would have made its discretion, not the Constitution, the measure of its powers, but that, as in all other cases of compact among parties having no common judge, each party has an equal right to judge for itself, as well of infractions as of the mode and measure of redress." A resolution of Kentucky in 1799 declared that nullification by the states of unauthorized acts done under color of the Constitution was the lawful and rightful remedy. The Virginia resolutions were practically the same. Mr. Calhoun with great ability advocated this view later. Even the great unionist, Andrew Jackson, in private letters, wavered as to the final power of decision of the nation.

The opponents of this contention appealed to the fact that the Constitution gave the federal judiciary jurisdiction of "all cases in law and equity arising under this Constitution, the laws of the United States or treaties made, or which shall be made, under their authority," and to the provision, "This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." They asked, "Who shall be the final judge of its own powers but that government whose constitution and laws are thus made supreme, and whose courts are given jurisdiction of all cases arising

under them, of course, with power to decide?" They said that there must be a final arbiter in dispute, else chaos, red war and disunion would reign, and that reason forbade the idea that there should be as many conflicting arbiters as there were states, and demanded that there be one final judge, and that the national supreme court; otherwise the Constitution would be one thing in one state, another in another. "Thirteen independent courts of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government from which nothing but contradiction and confusion can proceed," said an eminent statesman. The latter theory carried the day. It received support from many able sources, notably from Alexander Hamilton in that wonderful work, "The Federalist," which, as Mr. William L. Wilson says in his work, "The National Democratic Party," page 25, "was written chiefly by two young statesmen, one of New York (Hamilton), the other of Virginia (Madison), to explain and commend to their contemporaries in that great struggle, the new plan of government, but remaining today, and doubtless destined to remain for all time, the most instructive commentary on the federal Constitution." The doctrine was also most ably supported by the great opinion by Chief-Justice Marshall in Cohen v. Virginia.[2] This right of the national court to pass final judgment in the case supposed above has come to be settled doctrine from many cases.[3] Let

[2] 6 Wheat. 264.

[3] Ableman v. Booth, 21 How. 506; Tarble's Case, 13 Wall. 397; State v. Hunt, 2 Hill (S. C.) 1; *In re* Spangler, 11 Mich. 299; State v. Sponagle, 45 W. Va. 415; Laughlin v. La. Ice Co. 35 La. Ann. 1184; Elliot v. McCormick, 144 Mass. 10.

men differ as they may upon the abstract merits of the question, our political and legal history will attest that the course of time, from many causes, has, since the foundation of the government, given a trend towards large national power. Such has been the evolution of time and events. The great Civil War has set the final seal upon this great question so much debated through so many years. If such was the solution of that debate on the rostrum and in the forum upon the Constitution as it was before the Fourteenth Amendment came, it is plainer still that it is exclusively with the supreme court of the nation to say, finally and decisively, whether given action of a state violates that amendment, since its adoption; for it is not only prohibitory upon the states, saying that the states shall not do certain things, but its fifth section gives Congress express power to enforce the amendment by appropriate legislation. It being a part of the Constitution, all rights protected under it are questions arising "under this Constitution," and come within the pale of jurisdiction of federal courts under Section 2, Article 3.

"State Rights."—This short historical reference to the great questions of the past will serve to show that the expression "state rights," though still much used, is not in our day what it was many years ago. In those years it meant, in short, that as the states before the formation of the Constitution were sovereign, as such they formed it, not losing thereby that sovereignty, and the Union under the Constitution was not in strict sense a nation, but still, as under the Articles of Confederation, a mere compact or confederation of states, though with some greater powers, and that the states possessed the power,

without secession from the Union, for causes to them seeming sufficient, to ignore and nullify federal laws, or withdraw from the Union, and altogether cease their federal relation, cease to perform their functions as component members of the Union. This was not justified on the right of revolution, which all people have, if based on just cause, but on a power claimed as inherent in the states, which might be of right exercised, and could not be of right resisted by the Union or any of its members. Under this claim of right, a claim made by the great majority of the people of the slave-holding states, eleven of them withdrew from the Union in 1861, and then came the Civil War. The other view in those days was that of inter-independence or co-independence between states and Union, and conceded to the states their sovereignty within their sphere under the Constitution, and the sovereignty of the Union within its sphere under the Constitution, and in case of dispute as to their respective powers the Union was to be the final judge. Such is now the doctrine held by the supreme court, as laid down in Tarble's Case[4] and many prior cases, and generally conceded.

Nowadays "state rights" merely indicates a principle of construction of the federal Constitution as to the respective powers of state and nation, and does not claim the right of nullification or secession, but admits the powers of the federal government plainly granted in the Constitution, and also such powers, though not expressly there granted, as are plainly indispensable to enable the nation to execute the powers that are expressly granted; that

[4] 13 Wall. 397.

no power in the nation can be exercised unless granted in very letter, not by mere construction, and that no power claimed as a power by implication to execute a conceded express power can be allowed unless it be absolutely essential to carry out an expressly granted power, so essential that without it such expressly granted power could not be executed by the nation; and that where there is doubt it must be resolved in favor of the state, and the power denied to the nation. It is now merely a difference between a literal and rigid construction of the Constitution, and a liberal one as to the powers of the federal government. Constitutional state rights nobody denies, nor does anybody deny constitutional federal rights; the only difference is in the ascertainment of what are constitutional state rights and what are constitutional national rights. So long as we preserve our dual system of government both must be scrupulously observed, and as the final decision is with the federal supreme court, we see how important and grave are its functions. The fate of the Union must hang upon it.

Amendment Retroactive and Self-Enforcing.—A state statute or constitution not repugnant to any constitutional provision of the nation when made is nevertheless annulled by the amendment, if it conflicts with it; for no proceeding can take place under the state constitution or statute if its effect is to deprive anyone of a right secured by that amendment.[1]

It needs no legislation to nullify a state law contrary to the Fourteenth Amendment, but it by its own force

[1] Kaukanna v. Green Bay, 142 U. S. 254; Davis v. Burke, 179 U. S. 399, 21 Sup. Ct. 210.

nullifies the state law.[2] "A constitutional provision is self-operative where no legislation is necessary or could add to or take from it." [3]

First Ten Amendments.—It was earnestly contended in a late case that though it had been often held that the first ten amendments to the federal Constitution bound only the federal government, and not state action, and did not confer rights and privileges which from those amendments the states were bound to concede, yet that the very adoption of the Fourteenth Amendment changed all this, and made those amendments obligatory on the states; but the court took the other view, and held that it did not make those amendments operate on the states. Justice Harlan in a labored dissent held that because Amendment Six guaranteed a trial by jury, meaning a jury of twelve, a state could not by its constitution make the jury consist of less, and this because, as he thought, the amendment operated to make those amendments act on the states.[4]

[2] Neal v. Delaware, 103 U. S. 370.
[3] State v. Caldwell, 69 Am. St. R. 465.
[4] Spies v. Illinois, 123 U. S. 131; Bolln v. Nebraska, 176 U. S. 83.

Chapter 6.

PRIVILEGES AND IMMUNITIES. WHAT PROTECTED?

Not those that pertain to state citizenship. They must look to state constitutions and laws for protection; for the Fourteenth Amendment says that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," thus limiting the protection to privileges and immunities of United States citizenship. As elsewhere stated, there is state citizenship, there is national citizenship. There are privileges and immunities flowing from state citizenship, considered separately from national citizenship, and privileges and immunities flowing from national citizenship They are different.[4] The amendment, having created national citizenship, next defends it against abridgment by the states; but it has not assumed the defense of those privileges and immunities attending upon state citizenship alone.[5]

"There is in our political system a government of each

[4] U. S. v. Cruikshanks, 92 U. S. 542; Duncan v. Missouri, 152 Id., 377.

[5] Slaughter House Cases, 16 Wall. 36; Holden v. Hardy, 169 U. S. 366, 25 Am. St. R. 871; Bradwell v. U. S. 16 Wall. 130; U. S. v. Cruikshank, 92 U. S. 552.

of the several states and a government of the United States. Each is distinct from the other and has citizens of its own, who owe it allegiance and whose rights, within its jurisdiction, it must protect. The same person may be at the same time a citizen of the United States and a citizen of a state; but his right of citizenship under one of these governments will be different from those he has under the other." "Sovereignty for the protection of rights of life and personal liberty within the states rests alone with the states." So says the Supreme Court in U. S. v. Cruikshank.[6]

The privileges and immunities of a state citizen derived from state law must, under this particular clause, be protected by the state. That citizen must look alone to the state. The privileges and immunities of a national citizen derived from national law must be conceded and protected by the state just as much as if derived from its own laws, and if not so protected and enforced, that citizen can invoke the aid of the federal government. I said "under this particular clause;" for rights of a state citizen given by state law, if rights of life, liberty or property or equality before the law, must be protected by the nation if denied by the states, because of later clauses in the amendment.

Different Clauses.—It must be observed that it is often difficult to say certainly whether the thing claimed is a "privilege or immunity," falling under the clause protecting them, or concerns life, liberty, property or equality before the law, under the later clauses. Some rights may fall under more than one clause, or would if there were

[6] 92 U. S. 542.

not the several clauses. It may be important to discriminate, for if the right claimed be merely and only a "privilege or immunity," properly so called, it must rely only on the clause relating to them, which is narrower than the subsequent clauses; for it protects only "privileges and immunities of citizens of the United States"; whereas as to life, liberty or property, it protects "any person," and as to equal protection of the law, it protects "any person within its jurisdiction," no matter whether a citizen of the nation or state, or no citizen of either. This is a point of vital import in the construction of the amendment, because if the distinction between national and state citizenship is not preserved, every claim or pretense that a citizen has been deprived of a privilege would call for federal interference. Otherwise that interference is limited to cases of abridgment of privileges as a national citizen.[7]

Privileges Protected Further.—It might be thought at first blush that the intention was to protect the national citizen against abridgment of any of his rights, state or national. Suppose a person who is both a state and national citizen, and suppose that a privilege vested in him by state law is abridged by state law; it might be said that it was the purpose of the amendment to place all of his privileges and immunities under the panoply of its protection; and this because he is a citizen of the republic, domiciled within the territory of the nation, and because the language is general, "no state shall make or enforce any law which shall agridge the privileges or immunities of citizens of the United States"; but authorities hold that this person can not call upon the federal

[7] Slaughter House Cases, 16 Wall. 75.

government for help. This is because the amendment creates two citizenships in terms, and limits protection to "privileges or immunities of citizens of the United States." It recognizes both nation and state as governments, separate governments, each possessed of sovereign power within its sphere, and it leaves to the state alone the protection, within its territory, of the privileges conferred upon its citizens by its laws. If the erroneous construction spoken of above were held, a state could hardly be said to have any attribute of sovereignty or finality of decision; for when we grant, as we must, the power of the Union to see that no person shall be deprived of life, liberty or property without due process, nor be denied the equal protection of the law, and then add that all privileges and immunities of the citizen under both state and federal law are within federal control, we make the nation supreme over a vast expanse of governmental administration, leaving very little for state supremacy or finality. The most ardent advocates of state rights have always conceded certain powers in the federal government as essential to the performance of the functions assigned to it; and the most ardent advocates of federal power have always conceded certain powers in the states as essential to the performance of their functions. This must be so just as long as the dual system of federal and state government mapped out in the original formation of the federal government shall continue; otherwise revolution, not by arms, but by the silent yet potent force of judicial construction would ensue. Equipoise must be kept by cautious construction by that great court at Washington. No court on earth's orb has greater responsibility placed upon it. Our blessed government

was intended to have eternity. Its life depends on that court. Under guidance of Providence its ermine remains pure. Growth of population, growth of individual and corporate wealth, growth of power under the late amendments, the allurements of modernism, many influences, have all been powerless to swerve that court from its orbit. If in any decision in times gone by it did lose its orbit on mighty questions, and likely it did in one instance, it can not be said but that its record of the last forty years shows that its eye has been fixed on the pole star of sound, conservative construction of the Constitution, preserving the equipoise between states and nation, and maintaining the the just rights of citizen or person. Clamor has risen loud and high against it occasionally; but time and reflection have hushed that clamor to sleep. "Change and decay on all around we see," but the Supreme Court has not known change or decay. *Esto sacra. Procul profanum vulgus.* An appeal to the great number of cases decided by it involving the recent amendments to the Constitution will warrant this eulogy. Webster said that without this court the Constitution would be no constitution; the Government no government.

In this connection, speaking of the rejection of the construction placing all immunitites and privileges, whether under state or federal law, under this amendment, it may be appropriate to refer to the case of Logan v. United States.[8] It may be said that when that case held that a prisoner in the hands of a federal marshal under federal process had right to be protected by the United States from mob violence, so that those assaulting his person

[8] 144 U. S. 263.

were indictable under federal statute against conspiracy to "injure, oppress, threaten or intimidate any citizen in the free exercise and enjoyment of any right or privilege secured to him by the Constitution or laws of the United States", the court ranked as a privilege or immunity under the amendment the right to be secure from mere assault, battery and murder by individuals, and thus assumed for the federal courts jurisdiction to punish acts cognizable in state courts committed by individuals, when the amendment only restrained state action, not at all mere individual action; but the court disclaimed any right to jurisdiction under the amendment. The case is only important here as to that point. It is noted for that point. The court said that a citizen in custody had right under the Constitution and laws of the United States to be protected from lawless violence, as the Constitution impliedly grants power to punish offences against the United States. There may be question whether this right of safety is a "right or privilege" under the Constitution or laws of the United States, rather than under state law; whether that right to protection against personal violence does not inhere in the individual as a person, not as a citizen, and whether in custody under process or not, and so to be protected by the state; and whether the culprits were indictable under federal law only for resisting or obstructing lawful process, and not for invading a privilege of a national citizen as such. Clearly the statute is defensible under the amendment to prohibit an invasion of a privilege of a citizen of the United States; but the *quaere* is whether personal violence to a prisoner in custody under federal process is any more an attack on a privilege or right of a

federal citizen than an attack on a privilege of a state citizen in custody under state process, or not in custody. Be this as it may, it is important to say that the case must not be cited to show that the court exended the Fourteenth Amendment to the occurrence involved in the case.

The Need of the Privilege Clause.—I concur with Judge Cooley in his Principles of the Constitutional Law, in the opinion that this clause of the amendment is not essential, since state action, if it were not in the amendment, could not abridge a privilege or immunity resting on national right. The clause is only declaratory of antecedent law. We may say that the provision emphasizes pre-existing law, imbedding it in the Constitution forever, not leaving it to mere implication and court decision. It should be added, too, that the amendment expressly vests in Congress power of legislation to protect federal privileges and immunities. Before that amendment, as Chief-Justice Taney said, there was no express power in the nation to enforce such right if denied by the state, and this amendment does in words confer the power; but I apprehend that a power to protect federal privilege or immunity would, without the amendment, reside in the federal judiciary, and likely in Congress.

Privileges Protected Further.—The Fourteenth Amend ment does not protect privileges and immunities of citizens of the United States against assault from the national government. Nor does it protect privileges and immunities vested in a citizen of one state by reason of his citizenship therein against another state's action, as this is done by Article 4, §2, "The citizens of each state shall be entitled to all privileges and immunities of citizens of

the several states". That provision is not discussed in this work.

WHAT ARE PRIVILEGES AND IMMUNITIES?

Remember, as just stated, that we are speaking only of "privileges and immunities" flowing from national citizenship, not state citizenship.

No all-comprehensive classification can be made in advance. As was said by the Supreme Court[9] of these two words used in Article 4, §2, must be also said of them as found in Amendment Fourteen, that it is unwise to attempt such classification, but each case must be decided as it comes. At the start, it can be said that it is not everything that can demand protection claiming to be a "privilege or immunity". It must be something appertaining to the citizen that is cardinal, basic, fundamental, belonging to citizens of free governments.[10]

The privilege or immunity protected is only that inherent in and flowing from the *status* of citizenship, is inseparably connected with it, personal to the person, non-assignable.[11] The words of Amendment Fourteen, as those of Article 4, §2, show this to be so.

Each Clause has Separate Office.—It would seem that this privilege clause does not cover what the remaining clauses cover, life, liberty, property and equality before the law, because, though some would seem to fall under two clauses, yet, in construction we would infer that each clause has

[9] Collins v. Elliott, 18 How. 591; Davidson v. N. Orleans, 96 U. S. 97.

[10] Corfield v. Coryell, 4 Wash. C. C. 101.

[11] Slaughter's Case, 13 Grat. 767; Conner v. Elliott, 18 How. 591.

a separate office, and that it can not be presumed that separate clauses of one enactment, especially a sedate enactment by a constitution, apply to one and the same thing.

What are Privileges and Immunities?—No fixed general rule can be given; no specification can embrace every instance even now existing, and, of course, not those coming in future time, and such rule or specification can only be illustrative. We should add, what is an obvious principle and important to be remembered, applicable to the clause relative to privileges and immunities, and also that relative to protection to life, liberty and property, that the "privileges and immunities" protected are not merely those existing when the amendment was adopted, but also those to come in process of time. The Constitution is to last forever as the organic law, the base on which changes or additions built by time shall stand. Privileges and immunities of the federal citizen may arise from new legislation, so that legislation be within the scope of national authority. This shows the futility, the danger of any infallible definition of "privileges or immunities". So also "due process of law" is ever changing in the growth and mutable conditions of society. Process unknown in law today becomes due process of law from the action of the next legislature or the subsequent general practice of the courts. We can not take from such an instrument as a constitution capacity to meet the wants of coming years by an inflexible definition, especially such a provision as this amendment. Capacity for expansion must be allowed, else the Constitution would defeat its own purpose as the basic law.[12]

[12] Holden v. Hardy, 169 U. S. 366, 389, Story on Const. §422.

We must first take the plain meaning of the words "privileges and immunities". Do those words include the thing in question? "Privileges" is affirmative, positive; "Immunities", negative; the one meaning rights, the other exemption from wrongs. Privileges, in general sense, including both those under state and federal citizenship, are those belonging to the citizen, not merely to a person, and would include, for instances, the right to go and come through all the territory under the jurisdiction of the United States on lawful business or pleasure; to keep and bear arms; to make contracts; to acquire, hold and dispose of property; to sue and have admission to the courts and the benefit of *habeas corpus* and other legal remedies and the public records and books; to carry on lawful business; to use the mails, railroads, telegraphs, telephones, and other common carriers of the citizen's person, goods, or intelligence; to use public highways and easements; to be exempt from unreasonable searches of his domicile or premises, or seizure of his property; to enjoy light and air; to marry and have family; to seek happiness and pleasure; to worship God, and attend public worship of God and other public assemblages of the people; to entertain what religious opinions conscience dictates, and worship accordingly; to witness public domonstrations; to attend theatres and other public amusements; to eat and drink what he wishes; to obtain education in letters, music, art, profession, science, mechanics, or the like; to attend the public schools, no matter by what name known, common, graded or normal schools, academies, colleges or universities; to go to foreign lands; to peaceably assemble and confer upon religion, politics or busi-

ness; to write and express opinions upon public matters of business or religion; to petition the government for redress of grievances; freedom of the press.

These privileges and immunities belong to the citizen in free governments, but it rests with the government to allow, abridge or deny them, unless the Constitution stay its hand. Their enjoyment may be regulated or lost or subtracted from, under the police power, or power of taxation or eminent domain.

Privileges under Fourteenth Amendment Narrower.—But the general enumeration is broader than the Fourteenth Amendment. The words "privileges and immunities" in it do not embrace all rights above specified, for it concerns only those of them attendant upon federal citizenship. As to those the hands of the states are restrained by the amendment, but as to those not flowing from federal citizenship the nation assumes no protection, and they must depend on state constitutions, laws and administration for allowance and safety.[13]

FEDERAL PRIVILEGES AND IMMUNITIES PROTECTED BY AMENDMENT.

They are those pertaining to the citizen of the nation as such, derived from the federal Constitution, statute or treaty, given or granted by the federal government. For instances which may illustrate, the federal citizen may go and come through all the territory under the jurisdiction of the United States; he may go to the national capital on business or pleasure; he may depart to go to foreign

[13] Slaughter House Cases, 16 Wall. 37, 37 L. R. A. 103.

lands;[14] he may make contracts with the federal government, or with others where allowed by its laws, and acquire from it property or copyright or patent for the inventions and works of mind and hand; he may sue in its courts and have legal remedies and the benefit of its public records and books and offices; he may reside in any state; he may navigate public waters, however far they may penetrate states; he may carry on interstate or foreign commerce;[15] he may use the mails; he may by residence in a state become a citizen of that state, whether it so will or not; he may carry on interstate commerce free from obstruction by state prohibition or taxation; he may be given federal office or employment, with or without the state's consent, though the state may refuse its office to one holding federal office; he may exercise that office without state obstruction; he may assemble with others within a state to confer upon federal politics or matters and express and publish opinions thereon, and petition the federal government for redress of grievances;[16] he may have the benefit in every respect of federal bankruptcy; he may demand national protection on the high seas or in foreign lands.

In any case where under national law the citizen of the United States may do anything, or practice or enjoy any right, it is a "privilege" under Amendment Fourteen, and the right to be exempt from interference with, and denial of, it by state law by prohibition, penalty, tax or otherwise, is an "immunity" under the same. If the state law

[14] Crandall v. Nevada, 6 Wall. 35.
[15] Ward v. Maryland, 12 Wall. 418.
[16] U. S. v. Cruikshank, 92 U. S. 542.

amounts to an abridgment of such privilege, it violates the amendment.

These words, "privileges and immunities," are found in Article 4, Sec. 2, declaring that the "citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states," and in Corfield v. Coryell[17] Justice Washington gives them a definition frequently quoted in textbooks and decisions, and it has been highly extolled as approvable. He said that such privileges and immunities could be "all comprehended under the following general heads: Protection by the government, enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may prescribe for the general good."[18]

In short, as said in Logan v. United States,[19] "While certain fundamental rights, recognized and declared, but not created or granted, in some of the amendments, are thereby guaranteed only against violation or abridgment by the United States or the states, as the case may be, and can not therefore be affirmatively enforced by Congress against unlawful acts of individuals; yet every right created by, arising under or dependent upon the Constitution of the United States may be protected and enforced by Congress by such means and in such manner as Congress, in the exercise of the correlative duty of protection, or of the legislative powers conferred upon it by the Con-

[17] 4 Wash. C. C. 380.

[18] McCready's Case, 27 Grat. 985, 995; Cooley on Con. Lim. 15.

[19] 144 U. S. 293.

stitution, may in its discretion deem most eligible and best adapted to attain their object." Hence a citizen in the custody of the marshal was held to have right to be protected from individual violence, and parties were indictable under the federal statute against conspiring to injure and oppress citizens of the United States in the exercise of their enjoyment of the right to be secured against assault or bodily harm.

Privileges and Immunities, Further.—In the Corfield Case, *supra,* it is said: "The right of a citizen of one state to pass through or reside in any other state for the purposes of trade, agriculture, professional pursuits or otherwise; to claim the benefit of the writ of *habeas corpus;* to maintain actions in the courts of the state; to take, hold and dispose of property, real or personal; exemption from higher taxes or impositions than are paid by other citizens of the state, may be mentioned as some of the particular privileges and immunities of citizens which are embraced by the general description of privileges deemed to be fundamental, to which may be added the elective franchise as regulated and established by the constitution or laws of the state in which they are exercised. These and many others which might be mentioned are, strictly speaking, privileges and immunities, and the enjoyment of them by citizens of each state in every other state was manifestly calculated 'the better to secure and perpetuate mutual friendship and intercourse among the people of the different states of the Union.' "

Federal and State Privileges Different.—We must, however, remember that the clause of the Constitution involved in the opinion above quoted related to privileges

and immunities of citizens of states conferred upon them as such citizens by state law, and the Fourteenth Amendment had not then been adopted, and rights pertaining to national citizenship were not in the case, and therefore the opinion refers to some privileges purely belonging to state citizenship, not touched by the amendment. Article 4 in the section quoted in that case contains a guaranty by the federal government against denial by one state to a citizen of another state of the privileges and immunities given by the former state to its own citizens,[20] and does not relate to the federal citizen's rights, nor to the adverse action by a state upon its own citizen under its own laws. But the general principles there stated are usually treated as constituting a correct general rule.

Equal Protection.—It may occur to the mind that some of the privileges instanced above may be within the last clause of the amendment, giving every "person within its jurisdiction the equal protection of the laws"; but the first clause relates to citizen rights alone, and that later clause is leveled only against invidious discrimination by state law between persons equally entitled to the protection of law; it is only intended to insure equality before the law, not protection of privileges and immunities.[21]

It has been asserted that all the privileges and immunities protected against adverse action by the federal government in the first eight amendments are all protected by the Fourteenth Amendment, namely: The free exercise of religion; freedom of speech and press; right to assemble and petition for redress of grievances; to keep

[20] Blake v. McClung, 172 U. S. 239.

[21] Slaughter House Cases, 16 Wall. 77, 172 U. S. 252.

and bear arms; exemption from having soldiers quartered upon one's premises; security of person, houses, papers and effects against unreasonable searches and seizures; exemption from warrants of arrest and search, except for sworn probable cause; exemption from criminal trial without indictment by a grand jury; exemption from second jeopardy for the same act; exemption from self-crimination as a witness; immunity from deprivation of life, liberty or property without due process of law; exemption from having private property taken for public use without compensation; right to speedy trial, and that by jury, with specification of offense, with compulsory process for witnesses, and aid of counsel; right to jury trial in suits at common law; and exemption from demand of excessive bail.

It has been contended that all these privileges, immunities, exemptions or rights guaranteed against hostile action by the federal government are the very same ones intended to be all preserved against state action by the Fourteenth Amendment; that by the earlier amendments they were safe from federal invasion, but might be denied by the states without power in the nation to protect them, and that it was the object of the Fourteenth Amendment to cure this defect. It was so stated in Justice Field's dissent in the Slaughter House Cases, and in Congress when the amendment was proposed. The eminent constitutional lawyer, John Randolph Tucker, in the notable case of the Chicago Anarchists, Spies v. Illinois,[22] urgently insisted on this view. But as that case holds, those amendments had design only to restrain the federal gov-

[22] 123 U. S. 131.

ernment, and had no reference to state action, and while plausible, it is not conclusive to say that the subsequent Fourteenth Amendment intended to make all and every of the things protected against federal action by the first eight amendments privileges and immunities protected against state action. The court in that case does not approve that contention, to say the least. The case of Hurtado v. California,[23] holding good a trial for capital crime without indictment upon information, is against it. Those amendments are not affirmative grants of the rights they mention; they only prohibit Congress from interfering with them. If we could say that they originated and conferred those rights as pertaining to the citizen of the nation, we could more readily say that the Fourteenth Amendment covers them; but those amendments do not originate or confer those rights.[24] The true position would seem to me to be that some of the rights mentioned in the first eight amendments are "privileges and immunities" under the Fourteenth Amendment, and some are not. It depends on the nature of the right, not on the fact that it is mentioned in those amendments.

[23] 110 U. S. 516.

[24] U. S. v. Cruikshank, 92 U. S. 542, Sec. 6.

PARTICULAR PRIVILEGES AND IMMUNITIES PROTECTED.

Under decisions let us enumerate some things that are or are not privileges and immunities protected from state action by Amendment Fourteen.

Right of Suffrage.—This right is not given by federal law or Constitution, but comes alone from the state. The state may give or withhold it from whom it chooses, but can not deny it because of race, color or previous condition of servitude, as that would violate Amendment Fifteen.[25] Mere citizenship does not confer the vote. Nowhere does the federal Constitution dictate who shall vote. Very clear it is that the nation can not say who shall vote for state officers. This is so, because the national power is limited to express or implied grant in the Constitution, and this power to prescribe voters not being given to the nation, nor prohibited to the states, is reserved to the states, impliedly and also expressly, by the letter of Amendment Ten, as essential to the very existence of the states. But can the nation prescribe qualification for voters for federal office? It can not as to senators or presidential electors, because the Constitution leaves their selection to the states.

Congressmen.—Can the nation define who shall vote for representatives in Congress? As Article 1, Section 2, says that voters for such representatives "shall possess qualification requisite for electors of the most numerous branch of the state legislature," the prescription of the qualification of voters for congressmen is left to the state.

[25] U. S. v. Cruikshank, 92 U. S. 542, Sec. 9.

In Minor v. Happersett[26] a woman claimed that because she was a citizen under the Fourteenth Amendment that assured her a vote, though the constitution of the state limited voting to males; but the court held that "right of suffrage was not necessarily one of the privileges or immunities of citizenship before the adoption of the Fourteenth Amendment, and that amendment does not add to these privileges and immunities. It simply furnished additional guaranty for the protection of such as the citizen already had. At the time of the adoption of that amendment suffrage was not co-extensive with citizenship of states; nor was it at the time of the adoption of the Constitution. Neither the Constitution nor the Fourteenth Amendment made all citizens voters." It was held that state law could limit suffrage to males.

As the Constitution, Article 2, Section 2, says that "Each state shall appoint in such manner as the legislature thereof may direct," electors for president and vice-president, this function is left to the states. The state may appoint them by its legislature or by popular vote, either in separate districts or for the state at large, or part by districts and part by state at large.[27] It is the state law that punishes illegal voting for presidential electors. Justice Gray said: "Although electors are appointed and act under and pursuant to the Constitution of the United States, they are no more officers or agents of the United States than are members of the legislature when acting as electors of federal senators."[28] Not

[26] 21 Wallace, 162.
[27] McPherson v. Blacker, 146 U. S. 1.
[28] *In re* Green, 134 U. S. 377.

being federal but state officers, the nation can not specify qualifications for voters for presidential electors.

The opinion says that the United States has no voters of its own creation, and that its elective officers are elected by state voters, whose law must be supreme as to elective officers until Congress acts. Still, it does not say that Congress may not create voters and hold election for national officers. In Section 4, Article 1, is the provision that "the times, places and manner of holding election for senators and representatives shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulation, except as to the place of choosing senators." Under this section the law of the state as to qualifications of voters for congressmen and regulations for their election are the test until Congress itself otherwise enacts, provided Congress direct that the voters for congressmen possess the same qualifications as those prescribed by state law for voters for members of the most numerous branch of the state legislature. In *Ex parte* Seibold, 100 U. S. 371, the power of Congress is asserted to make full and complete regulations for the election of representatives, and such regulations supersede state regulations, but this does not say that it can direct who shall vote. Congress can not give a vote to one not possessing right to vote for a member of the state legislature. The opinion in Minor v. Happersett[29] left undecided the question whether Congress could interfere with state law prescribing qualifications for voters for congressmen, saying that no such interference had ever been attempted. I think the inference from that

[29] 21 Wall. 162.

case sustains the opinion which I have ventured above, that Congress can not prescribe who shall vote for congressmen, because the Constitution, in §2, Article 1, says that electors for congressmen shall have qualifications requisite for electors of the most numerous branch of the state legislatures, and nobody has ever questioned the absolute right of the state to fix their qualifications. So even as to election of federal officers we find no federal prescription as to who shall vote. There is clearly no power in the nation to say who shall vote for state officials as stated above. We can not say, strictly speaking, that Amendment Fifteen prescribes qualification for voters for state elections by giving and granting to colored people the right of suffrage, for it is held in U. S. v. Reese,[30] that "the Fifteenth Amendment does not confer the right of suffrage, but it invests citizens of the United States with the right of exemption from discrimination on account of color or previous condition of servitude, and empowers Congress to enforce that right by appropriate legislation." That amendment is the only instance in which Congress is given power to interfere with the state's power to qualify its voters. I note that *Ex parte* Yarbrough[31] qualifies the Reese Case, and explains it, but only in so far as it might be construed to hold that in no case does Amendment Fifteen confer suffrage on the colored man. The qualification does not seem material; for the Yarbrough Case grants that Amendment Fifteen does not, as an affirmative grant or definition of suffrage, confer the vote on the colored man unqualifiedly. It unquestion

[30] 92 U. S. 214.
[31] 110 U. S. 651. See Wiley v. Sinkler, 179 U. S. 58.

ably does give A, a colored man, qualified to vote in all other respects, save only color, as B, a white man, a right to vote. It is a privilege as well as an immunity; a privilege, because it practically says that A shall vote, since a prohibition of a denial of his vote is tantamount to a positive statement that he shall vote. It is an immunity because the amendment saves him from the loss of his vote by reason of color. If, therefore, state constitution or law makes color a qualification of voting, it violates a privilege or immunity given the colored man, violates Amendment Fifteen, and the state officers of election would be bound to ignore the state law, as it of its own force, without legislation, strikes the word "white" from the state constitution, [32] and Congress could enact a law granting the voter his vote in such case and punishing its denial. It would be a denial of a right given by Amendment Fifteen; but as properly held in United States v. Reese,[33] it would not come under Amendment Fourteen. It is not a privilege under Amendment Fourteen. It does not need that amendment for its maintenance. If the state definition of suffrage happen to deny it to a colored man for any substantial ground, not merely colorable, other than race, color, or previous condition of servitude, it violates no privilege or immunity given by the federal Constitution. Therefore the Reese Case seems sound. Amendment Fifteen does not unconditionally grant suffrage. That case does not differ from the Yarbrough Case. But if a man has a right to vote for a member of the most numerous branch of a state legislature by

[32] *Ex parte* Yarbrough, 110 U. S. 665.
[33] 92 U. S. 214.

state law, he then has a right to vote for a congressman, not merely by state law, but his vote is given, conferred by federal law under the Constitution as held in the Yarbrough Case.

Federal Protection of Voters.—While the nation has no voters under qualifications prescribed by it, yet it has representatives chosen at congressional elections fixed for a particular day by act of Congress. Presidential electors are chosen at the same election. These elections being essential to enable the United States to perform its functions, it has clear right to legislate for their regulation as a necessary incident to the right to have such officers chosen, and also under Section 4, Article 1, giving Congress power to make such regulations complete, or alter state legislation touching them. And under that authority Congress has passed stringent acts to punish officers of election for congressmen, whether the officers be of state or federal appointment, for nonperformance, or misperformance of duty, to punish all interfering with such officers by bribery, fraud or conspiracy, intimidation or otherwise, and punishing even persons acting under state law interfering with marshals or their deputies at such elections. Such legislation was held valid.[34] Stringent acts punishing persons for hindering voters in the exercise of their right to vote for congressmen or presidential electors by force, intimidation or threat have also been sustained under like authority.[35]

Voters in Territories.—Here the right of Congress to

[34] *Ex parte* Seibold, 100 U. S. 371; *Ex parte* Clark, Id., 399; *In re* Coy, 127 Id., 731.

[35] Rev. Stat. §§5508, 5520; *Ex parte* Yarbrough, 110 U. S. 651.

give or withhold suffrage and regulate elections and suffrage is clear. Its power is absolute.[36]

Sale of Liquors.—Laws of a state regulating or wholly prohibiting the sale of intoxicating liquors do not deprive of a privilege or immunity of citizenship contrary to Amendment Fourteen. The right to sell or manufacture spirituous liquors has been held not to be a privilege or immunity under that amendment.[37]

As such liquors are a merchantable commodity, one would think that the right to make or sell them in pursuit of a livelihood would be a "privilege" under the law. So it is in nature; but it is unquestionably within the police power of a state to prohibit their manufacture or sale within it. The power exists, not because carrying on the business is not a privilege, but because it falls under the police power to prohibit it.[38] It has been claimed that such prohibitory laws violate that clause of the amendment protecting property, but that has not prevented state prohibition. Viewed either in the light of legislation prejudicial to privilege, property or liberty, such prohibition is to be defended solely under the police power, and the Fourteenth Amendment was not designed to detract from the state's police power.[39] In fact, however, this right would be better classified as one of personal liberty, falling under the word "liberty" in the amendment, rather than under the word "privileges."

[36] Opinion in Murphy v. Ramsey, 114 U. S. 44, 97 Am. D. 267; Bank v. County, 101 U. S. 129.

[37] Giozza v. Tiernan, 148 U. S. 657; Miller v. Ammon, 145 Id., 421; Vance v. W. A. Vandercook, 170 Id., 438; Reyman Co. v. Brister, 179 U. S. 445, 21 Sup. Ct. 201.

[38] Kidd v. Pierson, 128 U. S. 1; Mugler v. Kansas, 123 Id., 623.

[39] Powell v. Pennsylvania, 127 U. S. 678.

However, it is not a privilege of federal citizenship, if regarded a privilege, and therefore under that head would not fall under the amendment. I repeat that only privileges and immunities of federal citizenship, not those of state citizenship, are protected by this clause of the amendment.

Prohibition of Manufacture.—The state may prohibit the manufacture of liquors within its borders for export.[40] Its police power is complete until *transitus* has begun actually, and until it is finished.[41]

Liquors sent from State to State.—It may not be amiss here to mention that state law can not prohibit the sending of spirituous liquors by one man in one state to another man in another state. The interstate commerce clause of the Constitution would condemn such legislation. At one time this clause allowed this transportation, not only up to the delivery to the consignee of the liquor, but allowed him to sell it in the original packages in which it was put up in the state from which it was sent, notwithstanding state law prohibiting such sale; but an act of Congress in 1890 so modified this doctrine as to protect the liquor only until delivery to the consignee, and then it falls under the restraint of state laws as to prohibition or regulation.[42] Still, that case and Vance v. W. A. Vandercook,[43] do allow importation of spirituous liquors into one state from another, and delivery to its consignee, notwithstanding state prohibition. The late act brings the liquor, after delivery to the consignee, under

[40] Kidd v. Pierson, 128 U. S. 1.
[41] Giozza v. Tiernan, 148 U. S. 657.
[42] Rhodes v. Iowa, 170 U. S. 412.
[43] 170 U. S. 438.

the state law, so that the consignee can no longer sell it, though it remains in original packages of shipment, unless authorized by state law to do so.

Keeping Liquor in Possession for another, as in storage-houses, has been prohibited in some states by statute; but such statutes have been held void as repugnant to the amendment, and not justified by the police power.[44]

Military Parades.—These are very common. Though a privilege, they are within the control of the state, as such privilege is not one attending federal citizenship, and a state may regulate the privileges and immunities of its own citizens, if it does not abridge those of citizens of the United States.[45] The right to drill and parade with arms, without authority of federal or state law, it was held in the case last cited, could be prohibited by the governor.

Practice of Law might be regarded a privilege to earn a living; but it has been held not such under the amendment, but subject to state control.[46]

Practice of Medicine.—A state statute regulating it, limiting the privilege to those possessing certain qualifications, was held not repugnant to the amendment.[47] The right to practice medicine does not seem to have been claimed to deny a privilege, in that case, but it was claimed that it invaded a property right. If a privilege, it is one

[44] State v. Gillman, 33 W. Va. 146; *Ex parte* Brown, 70 Am. St. R. 743.

[45] Presser v. Illinois, 116 U. S. 252.

[46] Bradwell v. State, 16 Wall. 130; *In re* Lockwood, 154 U. S. 116.

[47] Dent v. West Va. 129 U. S. 114; State v. Webster, 150 Ind. 607 (full); Scholle v. State, 46 Atl. 326; Noel v. People, 187 Ill. 587.

of state citizenship; and if it is a property right or a liberty right, it is still subject to state police regulation.

Dentistry, Practice of, falls under the same principle.[48]

Marriage between White and Colored Persons may be prohibited by a state, notwithstanding the amendment.[49] Regulation of marriage is a police power essential to the state, and is not impaired by the Fourteenth Amendment.

Jury Trial in State Court is not a privilege or immunity of national citizenship which the amendment prohibits the state from abridging.[50] The state was dealing with its own citizens in the administration of its laws by its own procedure. This jury right did not exist because he was a citizen of the United States, and the amendment only defends privileges as such coming from national citizenship.

Monopoly Damaging Business and Property.—In the great Slaughter-House Cases[51] the claim was made that an act Act of Louisiana incorporating a company with exclusive right for twenty-five years to maintain slaughter-houses, landings and stockyards for cattle and sheep intended for sale or slaughter, and to charge fees therefor, the monopoly covering an area including the city of New Orleans and a population of 300,000, and prohibiting all persons from doing like business within the area, and requiring all stock for sale or slaughter within it to be landed there, but allowing all owners of stock to land it

[48] 14 L. R. A. 581; Gosnell v. State, 52 Ark. 228, 12 S. W. 392; State v. Creditor, 21 Am. St. 306; State v. Knowles, 49 L. R. A. 695, 90 Md. 646.

[49] *Ex parte* Hobbs, 1 Woods, 537; State v. Gibson, 36 Ind. 389.

[50] L. & N. Co. v. Schmidt, 177 U. S. 230; Walker v. Sauvinet, 92 U. S. 90.

[51] 16 Wall. 36. See Newburyport Co. v. City, 103 Fed. 584.

there and all butchers to slaughter there—it was claimed that it was not only a monopoly, but that the act deprived the butchers of privilege and immunity on the theory that they had the right to carry on their legitimate business without fee, and that the act trenched on their right to make a living, and on the right of the people to be supplied by them with the necessaries of life, and also took away property without due process of law. The court held that the rights claimed were not "privileges and immunities of citizens of the United States within the meaning of the clause of the Fourteenth Amendment under consideration." At first thought, we might doubt this decision; but it seems on second thought clear that the act was defensible under the state's police power, and at any rate, the right claimed by these complaining persons did not inhere in them as citizens of the nation, but as citizens of the state, subject to state control, and whether their privileges and immunities were violated was a state judicial question, not a federal question. If the act had interfered with interstate commerce, it might be different, as the right to carry on such commerce should be considered a privilege pertaining to the person as a citizen of the Union. Four out of the nine judges sitting in the case dissented.

Colored Jurors.—I take it that the case of Strauder v. West Virginia,[52] holding that a state statute excluding colored persons from juries, is repugnant to the Fourteenth Amendment, falls under that clause against deny-

[52] 100 U. S. 303; *In re* Wood, 140 U. S. 278; Carter v. Texas, 177 U. S. 442.

ing equal protection of the laws, rather than the clause of privileges and immunities.

Colored Persons' Rights in Hotels, etc.—An act of Congress declared that all persons should be entitled to equal enjoyment of inns, public conveyances, theatres and other places of amusement. If that act were valid, such enjoyment of inns, conveyances and theatres would be a "privilege," and a privilege of a national citizen, because given by national law; but The Civil Rights Cases[53] held the act unconstitutional, because not warranted by the Fourteenth Amendment, it being legislation of original character belonging to the states, not merely corrective of state legislation. They waived the point whether such right was an essential right beyond state abridgment, the act giving the right being void. As the act was void, the right given by it could not be a privilege of federal citizenship, though it might be one of state citizenship, and could not be a subject of federal cognizance, but only of state cognizance. The court laid down the principle that legislation by Congress under Section 5, of Amendment Fourteen, must not be legislation for the government of the people of the states, a code, or part of a code of law; that is, legislation of affirmative or general nature, even on the subjects respecting which the state is prohibited by the amendment, but only legislation in its nature corrective of state law, or action of officers under state authority—only counteracting state law or action under its authority. This is an important case and an important principle. The case still leaves with the states, notwithstanding the augmentation of congressional power made

[53] 109 U. S. 3.

by the amendment, the right to legislate for the government of their people, and denies to Congress the capacity to do so, conceding it capacity only to legislate so far as is found necessary, from actual state action, to carry out the prohibition upon the states made by the amendment. The function assigned to Congress by those cases is rather antidotal or corrective—to stop, to remedy further mischief from state law or action. The Civil Rights Cases discriminate between the act admitting colored persons to hotels, conveyances and theatres, and the act called "The Civil Rights Bill," declaring the same right of all persons to make contracts, sue, give evidence, to have the benefit of all laws for the security of persons and property, and to acquire and convey property, as is enjoyed by white citizens, treating the latter act as valid, because made in counteraction of actually existing state law making discrimination between white and colored people as to ability to contract, hold property, give evidence, etc. The latter act is to secure *civil rights*. It might be said the other act related to *social* rights. It may be questionable to say, though the amendment is only prohibitory in character, that Congress could not pass laws to anticipate and prevent in advance apprehended state action in violation of such prohibition; but the Civil Rights Cases do so; at least, they deny power in Congress to assume the function of legislating generally, like a state legislature, for the government of the people of a state, even in respect to the matters dealt with by the amendment. The spirit of the decision—the general way blazed out by it—is right. It must not be assumed beforehand that a state will violate the federal Constitution, or deny essential rights to

its people. The nation should not regard the states as alien or hostile, any more than the people of the states should harbor an insane jealousy of the federal government, and regard it as an alien enemy bent on destruction of the rights of the states. Nation and states should be in this matter one and inseparable. The median line is here the line of safety, as it generally is.

Another sound reason given by the court in the Civil Rights Cases why the privileges there involved did not fall under the Fourteenth Amendment, is, that the amendment only deals with state action, not *individual* action, and the denial of admission by a hotelkeeper or owner of a conveyance or theatre is an individual act. And would not the police power of the state in such case forbid the federal statute?

Those cases do not pass on the right of Congress to compel admission to conveyances passing between states. Possibly it would be a privilege enforceable by Congress, because the commerce clause gives right to carry on interstate commerce, and passing from state to state is an essential in its transaction.

Attention is called to the fact that the power of Congress under the Fourteenth Amendment to enforce it by "appropriate legislation" is different from its power to legislate generally as to foreign and interstate commerce, mails, coinage and war, because the Constitution as to those subjects invests Congress with plenary and complete power of legislation, exclusive of the states. As to them, Congress is what a state legislature is as to other matters within its domain.[54]

[54] Passenger Cases, 7 How. 283.

Separate Cars for White and Colored.—The Supreme Court holds that an act of a state requiring white and colored persons to ride in separate railroad cars, but providing equal accommodation for both, does not violate a privilege or immunity under the Fourteenth Amendment.[55]

The opinion of Justice Brown says: "The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law; and in the nature of things it could not have been intended to abolish distinction based on color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, or even requiring, their separation in places where they are liable to be brought into contact, do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of state legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power, even by courts of states where the political rights of the colored race have been longest and most earnestly enforced." The court said this case did not conflict with R. R. Company v. Brown,[56] holding that where a statute provided that "no person should be excluded from the cars on account of color," no one could be excluded from

[55] Plessy v. Ferguson, 163 U. S. 537, 18 L. R. A. 639 and notes; C. & O. Co. v. Kentucky, 179 U. S. 388.

[56] 17 Wall. 445.

any car, though separate ones were furnished for the two races.

Trains from State to State.—In the case above mentioned the court did not apply the rule to cars running from state to state engaged in interstate commerce. The Supreme Court has held state laws for separate cars valid, because construed by the state court as applicable only to internal passenger carriage, that is, to cars running only in the state, and did not directly, but did virtually, decide that as to cars passing from state to state, the state law would be invalid.[57] It may be regarded doubtful whether we can regard those decisions as pointed that such state laws would be invalid; but if so, we must remember that this federal power is not to be attributed to the Fourteenth Amendment, as it comes alone from the old commerce clause giving Congress power to regulate commerce between the states. Now, if the federal act giving colored people entrance into inns and public conveyances were valid, probably the right to go into any car might be deemed a privilage of federal citizenship under the amendment; but the Civil Rights Cases held it void. Losing that foundation, we must look to some other clause of the amendment to overthrow state law of separate cars. We may say that it is a part of personal liberty, the right of locomotion; but though it be, still if the law gives substantially equal accommodation, though the passenger goes to another state, that right is not denied or abridged. The state law is merely one of regulation. As to the commerce clause, how is a man, though going from state to state to sell his cattle, retarded or obstructed in his right to carry

[57] Louisville, etc., v. Mississippi, 133 U. S. 587; C. & O. Co. v. Kentucky, 179 U. S. 388.

on interstate commerce, if given like transportation with another man? Such legislation, if the state regard it best for the harmony and comfort of the two races, and conducive to public order, would seem to find full warrant under the police power. And is it a privilege of federal citizenship? But it seems it would be invalid.[58]

Separate Schools for White and Colored.—Laws so providing have been sustained as valid. Mr. Justice Brown so regards them in Plessy v. Ferguson.[59] Chief-Justice Shaw, in the Supreme Court of Massachusetts, said: "It is urged that this maintenance of separate schools tends to deepen and perpetuate the odious distinction of cast, founded in deep-rooted prejudice in public opinion. This prejudice, if it exists, is not created by law, probably can not be changed by law. Whether this distinction and prejudice existing in the opinion and feelings of the community would not be as effectually fostered by compelling colored and white children to associate together in the same school, may well be doubted; at all events, it is a fair and proper question for the committee to decide upon, having in view the best interests of both classes placed under their superintendence, and we can not say their decision is not founded on just ground of reason and experience, and is the result of discriminating and honest judgment."[60]

That case was before the Fourteenth Amendment, but its principles are sound under it. Separate schools are justified by the police power, as Justice Brown said in

[58] Hall v. De Cuir, 95 U. S. 485; Anderson v. Co., 62 Fed. 46.
[59] 163 U. S. 544.
[60] Roberts v. City, 5 Cush. 198.

Plessy v. Ferguson, *supra,* which power is intact in the states, notwithstanding the amendment. If this were not so, how can we say that a right to obtain an education under state law and expense is a right belonging to federal citizenship, when it emanates from state law? Not being a federal right, it does not come under the amendment. It is a great privilege, it is true, and belongs, as of right, to the colored child under the state's free school system, and must be enforced; but it is because he is a state citizen. It is not a matter of federal cognizance. In Martin v. Board of Education,[61] Judge Dent said: "The meritorious question presented is as to whether Section 8 of Article 12 of the Constitution of this state is repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States, in this: that it declares that white and colored persons shall not be taught in the same school. The only privilage that appears to be denied to colored children in this section is that of association with white children, and *vice versa.* If it had required that they should be taught in the same school, then it would have been a compulsory infringement of the rights of both, but, as it is now, it treats them both alike, and places them precisely on the same footing. It prevents the legislature and boards of education from infringing on the rights of both in compelling them to attend a common school, which might be highly detrimental to both, and injurious to the school. Social equality can not be enforced by law. This question has already been settled by numerous decisions of state and federal courts. Hall v. De Cuir, 95 U. S. 485; Slaughter-House Cases,

[61] 42 W. Va. 514.

16 Wall. 36; State v. McCann, 21 Ohio St. 210; People v. Gallagher, 93 N. Y. 438; Cory v. Carter, 48 Ind. 337; Lehew v. Brummell, 103 Mo. 546, 15 S. W. 765; Ward v. Flood, 48 Cal. 36."

The New York court said in People v. Gallagher, *supra*: "In the nature of things there must be many social distinctions and privileges remaining unregulated by law, and left to individual control as citizens, beyond reach of legislative functions of government to organize and control. The attempt to enforce social intimacy and intercourse between races by legal enactment would probably tend only to embitter the prejudices, if such things are, which exist between them, and produce evil instead of good results. . . . When the state has secured to each citizen equal right before the law, and equal opportunity for improvement and progress, it has accomplished the end for which it was organized." The court held that the act did not violate the Fourteenth Amendment. It was so held in State v. McCann.[62] The court said that the separation of white and colored was no more unreasonable than separation on account of sex or grade.[63] The Supreme Court of the United States has held that a decision by a state court refusing an injunction against the maintenance of a high school for white children, while failing to maintain one for colored children also, for the reason that the funds were not sufficient to maintain it in addition to needed primary schools for colored children, is not a denial to colored persons of the equal pro-

[62] 21 Ohio St. 198.
[63] Dawson v. Lee, 83 Ky. 49.

tection of the law, or equal privileges of citizens of the United States.[64]

An act applying the taxes collected from each race to the schools of each race has been held contrary to the Fourteenth Amendment.[65]

In Clark v. Maryland Institute,[66] it was held that an educational institution, though given municipal aid, is not a part of the public school system, and may exclude colored pupils without violating the Fourteenth Amendment, as denying the equal protection of law or the immunities of citizens, as the amendment applies only to state action, not to actions of individuals or private corporations.

Carrying Deadly Weapons. Statute Prohibiting, not a Violation of the Fourteenth Amendment, or the Second Amendment. The second does not grant the right to carry a weapon. It operates only on the federal government. It does not impair the state power of regulation and police in this respect.[67]

Diseased Cattle Running at Large.—A state law imposing a penalty for allowing cattle having Texas fever to run at large, applying to all persons alike, was held not to abridge privileges and immunities under the Fourteenth Amendment, nor violate the commerce clause.[68] The police power of the state would warrant the statute. This decision is to be distinguished from Railroad v.

[64] Cumming v. County Board, 175 U. S. 528.

[65] Claybrook v. City, 23 Fed. 634; Marcum v. Manning, 96 N. C. 132.

[66] 87 Md. 643.

[67] Miller v. Texas, 153 U. S. 535; U. S. v. Cruikshank, 92 Id. 542.

[68] Kimmish v. Ball, 129 Id. 217; Missouri, etc., R. Co. v. Haber, 169 U. S. 613.

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Husen,[69] holding void a statute prohibiting the introduction into the state during eight months of the year of Texas cattle. The latter case was held not within the police power. The exclusion total of all Texas, Mexican or Indian cattle, diseased or not, was beyond needful police power. This case seems to recognize that the commerce clause is not to be construed as a surrender by the state of its police power, and at the same time seems elsewhere to assert the contrary, by holding that as the power of Congress to regulate interstate commerce is plenary, it is a surrender of state police power. This plenary power of legislation in Congress under the commerce clause does not exist under the Fourteenth Amendment. The latter only authorizes restrictive legislation, as stated in the Civil Rights Cases.[70]

Execution of Death Sentence by Electricity.—The clause of the Fourteenth Amendment against state abridgment of privileges and immunities was appealed to against a state statute changing the execution of death sentence from hanging to electrocution; but it was held not to invalidate the law.[71]

Solitary Confinement of Felons until Execution of Death Sentence.—Statute directing it held valid.[72]

Assemblages to Petition Government of the United States for "redress of grievances, or for anything connected with the powers and duties of the national government, is an attribute, a privilege, of national citizenship, and as such under the protection of and guaranteed by the United

[69] 95 U. S. 465.
[70] 109 U. S. 3.
[71] *In re* Kemmler, 136 U. S. 436.
[72] McElvaine v. Brush, 142 U. S. 155.

States. The very idea of a government republican in form implies that right, and an invasion of it presents a case within the sovereignty of the United States." [73]

Right to take Homestead or Preempt Land under federal law is a privilege national, to be vindicated by national law.[74]

Minors in Saloons.—A statute imposing a penalty for allowing a minor to remain in a saloon was held not to violate the Fourteenth Amendment as depriving a citizen of privileges.[75]

Sunday Law requiring places of business to be closed that day does not violate the Fourteenth Amendment as to abridging privileges of federal citizens; it touches only rights of state citizens. It is within the police power and valid.[76] Cases conflict.

Vaccination as Essential to Attend School.—Statute not void under the Fourteenth Amendment.[77]

Right of Contract—Civil Rights Act.—The Civil Rights Act gives every "person" within national jurisdiction "the same right" to contract, give evidence, sue, have the benefit of all laws for security of person and property, and to acquire and transfer property, "as is enjoyed by white persons." Are these rights "privileges and immunities" under the clause of the amendment now under consideration? Can it be sustained as constitutional by the clause? I do not think it falls under this clause,

[73] U. S. v. Cruikshank, 92 U. S. 542.

[74] U. S. v. Waddill, 112 U. S. 76.

[75] People v. Japinga, 115 Mich. 222; Gastineau v. Ky. 49 L. R. A. 111.

[76] State v. Fernandez, 39 La. Ann. 538: People v. Pellet, 41 Am. St. R. 589, 45 L. R. A. 504; Petit v. Minnesota, 177 U. S. 164. *Contra* Denver v. Bach, 58 Pac. 1089.

[77] Bissell v. Davisson, 65 Conn. 183.

though one would be disposed to call the rights given by that act privileges of high cast. The act gives these rights to all "persons" within federal jurisdiction, whether citizens of the United States or not; whereas the amendment in the present clause protects privileges and immunities of only national citizens, the act being in this respect broader than the amendment. The act grants these rights only to colored persons, as its language shows.[78] It could not, therefore, intend to cover the ground of this clause of the amendment, which defends the privileges and immunities of federal citizens, white or colored. And this clause only warrants congressional legislation as regards privileges and immunities of national citizens, whereas this act is for all persons. Hence we must look to other clauses for authority for this great act. We shall find it in later provisions of the amendment denying to states the power to deprive any person of life, liberty or property without due process of law, or to withhold the equal protection of the laws. As the act finds its full shelter under them, the present privilege clause does not apply, as it was not intended to be as broad, or cover the same ground as subsequent clauses.

As the privilege and immunity clause is limited to privileges and immunities of national citizenship in terms, as distinguished from state citizenship, not so many rights fall under it, as federal privileges are less numerous than those of state citizens under state law. In addition, no federal privileges or immunities are protected by this clause that were not protected before it came, or which would not be protected without it. How could a state

[78]Rev. Stat. §§1977, 1978; U. S. v. Sanges, 48 Fed. 78.

prejudice a federal privilege? The federal power would intervene for its protection without this amendment. True, the amendment gives Congress power to enforce it; but it is supposed that efficacious remedy for infraction of a federal privilege would exist without this clause. Hence the great utility of this clause is not apparent. The core of this great amendment lies in its guaranty of life, liberty, property and equality before the law.

Chapter 7.

LIFE, LIBERTY, PROPERTY, EQUAL PROTECTION OF LAW.

At the threshold of the discussion of the clauses of the Fourteenth Amendment touching these subjects, it is proper to say that it is no matter by what proceeding, or in what manner, the state deprives the person of life, liberty or property, or denies him the equal protection of the law, without due process of law, whether by legislation or judicial decision, or by what officer or agent, or agency, so it be by state authority, or by any subordinate division, as by municipal corporation, the result is the same, and is equally prohibited. But it is only the state that is prohibited, not individual action. It does not touch individual action.[1] The infraction of the amendment may be by a municipal corporation, or by the state legislature, or governor.[2] It is different with that clause of the original constitution which prohibits a state from passing any "law" impairing the obligation of contracts; for as the word law is used, it has been adjudged that this provision "is aimed at the legislative power of the

[1] Virginia v. Rives, 100 U. S. 313; C. B. & Q Co. v. Chicago, 166 U. S. 226.

[2] Penn Mutual v. City of Austin, 168 U. S. 685.

state, not a decision of its courts, or acts of executive or administrative boards or officers, or doings of private corporations or individuals."[3]

But any agency of the state, where it has power to make "law," as a municipality laying tax violative of contract, may infract this contract clause.

Note, that in the Fourteenth Amendment the word "law" is used in the first provision saying that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," but not in the subsequent clauses, which broadly declare that no state shall "deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law." Here the prohibition is upon the state, whether its harmful act be by legislature, court or officer.

MAGNA CHARTA.

Sacred things should be preserved in perpetual memorial. In all the tomes of the written law of the wasting centuries there is no more sacred monument erected by man struggling for freedom than is the Great Charter. It is holy, because to the reader of history it goes back and tells of the woes and sufferings of man under the yoke of tyranny and autocratic government, and of his final success in the struggle for human right; and it tells of the promise and guaranty of everlasting human freedom. The tree has borne its enduring fruit. Liberty is sanctified in Magna Charta. It will never perish

[3] N. O. Water Works v. La. Sugar Co., 125 U. S. 18.

from the earth. It is the child of political evolution, and evolution never works backward. The Anglo-Saxon wherever he has planted his foot has enshrined Magna Charta in his constitutional law. Whether he is in England or her colonies in distant seas, or is in the great American Republic or its colonies in distant seas, he will never give up Magna Charta. It is bone of his bone, sinew of his sinew. He will know no change or shadow of turning in this regard. Revolutions never go backward. It is thus a fitting initial under the important heading of life, liberty and property, and equality before the law, to incorporate the not classical, but plain and robust, Latin in which Magna Charta was extorted from King John by the sturdy Barons of England at Runnymede, in June, 1215; for this is the progenitor of the immortal principles of freedom found in all the American constitutions, and in the national Constitution.

"Ne corpus liberi hominis capiatur nec imprisonetur nec disseisietur nec utlagetur nec exuletur, nec aliquo modo destruatur, nec rex eat vel mittat super eum vi, nisi per judicium parium suorum, vel per legem terrae."

"Let not the body of a freeman be taken or imprisoned or (he) be disseised or outlawed or exiled, nor let him be in any manner destroyed, nor let the King go or send against him with force, except by the judgment of his peers or the law of the land."

Those two words, *"liberi hominis,"* apply the blessings of this charter to all free people, as *"homo"* means man, woman, child, mankind, the same as "person" in our amendment. We omit the word *liber,* free, because we are all freemen, unlike England in 1215. How conse-

crated in English hearts was the Great Charter we may know from the fact that it was required to be read aloud in cathedral churches twice a year, and by sheriffs four times a year in open county court, and all archbishops and bishops were by Statute 25, Edward I., required to pronounce ecclesiastical excommunication against all violating it. This was the curse:

"In the name of the Father, Son and Holy Ghost, Amen. Whereas, Our sovereign Lord, the King, to the honor of God and the Holy Church, and for the common profit of the realm, hath granted for him and his heirs forever, these articles above written; Robert, Arch-Bishop of Canterbury, primate of all England, admonisheth all his province, once, twice and thrice: Because that shortness will not suffer so much delay as to give knowledge to all the people of England of these presents in writing; we therefore enjoyn all persons, of what estate soever they may be, that they and every of them, as much as in them is, shall uphold and maintain these articles granted by our Sovereign, the King, in all points. And all those that in any point do resist or break those ordinances, or go about it, by word or deed, openly or privily, by any manner of pretense, or color, We, the aforesaid Arch-Bishop, by our authority in this writing expressed, do excommunicate and accurse, and from the body of our Lord Jesus Christ, and from all the company of Heaven, and from all the sacraments of Holy Church, do sequester and exclude."

History says that this Great Charter was wrested from John by the English barons by force; but those nobles did not this work for themselves. The Great Commoner,

in the House of Lords in 1770, said: "They did not say, these are the rights of the great barons, or these are the rights of the great prelates. No, my lords; they said in the simple Latin of the time, *Nullus liber homo,* and provided as carefully for the meanest subject as for the greatest. These are uncouth words, and sound but poorly in the ears of scholars; neither are they addressed to the criticism of scholars, but to the hearts of freemen. These three words have a meaning which interests us all; they deserve to be remembered, they deserve to be inculcated in our minds, they are worth all the classics."

The American states are indebted to England for their constitutional liberty, a heritage which must always endear the mother country to every true, fairminded American. From her we derived our laws, our freedom, our language, our religion—all we hold most dear and sacred. The Anglo-Saxon hath builded well wherever he has set his sole; his structures are eternal, imperishable; he will dominate the world, not by fire and sword, not by tyranny and oppression, but by civilization, education, and the undying principles of Magna Charta.

Old as the Charter is, Coke says that its rights belonged to the English people long before 1215, and that "this statute of magna charta is but a confirmation or restitution of the common law." He says: "It is called Magna Charta, not for the length or largeness of it (for it is but short in respect of the charters granted of private things to private persons, being *elephantinae chartae*), but it is called the great charter in respect of the great weightiness or weighty greatness of the matter contained in it in a few words, being the fountain of all the fundamental laws of the

realm, and therefore it may be truly said of it that it is *magnum in parvo.*[4]

Our English fathers lost its liberties at times; tyranny often sought to forget or annul; but those sturdy freemen demanded and had the charter confirmed above thirty times, according to Lord Coke. We boast of the wisdom of our American forefathers in the engraftment of free principles in our fabric; but the palm belongs to those old English barons. Illustrious is the parentage of those immortal principles of human liberty imbedded in American constitutional law. The Great Charter was reaffirmed in 1216, in the infancy of John's son, Henry III., by the advice of Gualo, the Pope's legate. When of age Henry cancelled it; but in 1254, at a great council where he was present, the archbishop of Canterbury and bishops of the Roman Catholic church, in canonicals, with tapers burning, denounced sentence of excommunication upon the breakers of this covenant of liberty, no matter how high their place, and Henry restored the charter. Thus the church, to its renown and honor, stood the godfather and patron of human rights. She never saw a more illustrious day in her long history, nor performed a higher act for man on earth. The charter hath been given to us. Shall we, of England and America, keep it? Unquestionably. The forward march of man, the freedom of speech and press, popular education, human evolution and exaltation, all forbid that the children shall give up this holy testament of the fathers.

> **"For freedom's battle once begun,**
> **Is handed down from sire to son."**

[4] 1 Coke Lyt. 22.

LIFE, LIBERTY AND PROPERTY.

We come now to that clause of the Fourteenth Amendment saying, "Nor shall any state deprive any person of life, liberty or property without due process of law." A vastly important clause is this one, as before stated. It is nothing new. It is only Magna Charta over again. It is, and before this amendment was, in all the state constitutions. It was not a stranger to the national Constitution before the birth of the Fourteenth Amendment; for it is found in the Fourth Amendment; but that amendment, as also every one of the first ten amendments, operates only on the national government, not on the states;[5] so that until the Fourteenth Amendment came there was not any right or color of power in the national government to compel a state to concede to its own citizens, or persons under its jurisdiction, rights of even life, liberty or property, nor restrain a state's action hostile thereto by any coercive or supervisory power, legislative, executive or judicial. In the long life of the government there had been no call for this restraining hand upon the states. They had been sovereign therein up to the adoption of this amendment. We are thus naturally led to ask, What event caused the great change bringing in its train the great augmentation of national power over the states? The answer is, the Civil War and its logical results upon the condition of millions of people. The call for that amendment was not to curb the power of the states to secede from the Union, and destroy it; that was settled by the arbitrament of arms; but the moving object, pur-

[5] Spies v. Illinois, 123 U. S. 131, 166.

pose and necessity for the amendment was the altered condition, as a result of the war, of the millions of slaves, from that of slaves to freemen, and their inequality with other men before the laws of the states. It would seem that so soon as the Thirteenth Amendment was adopted, as it abolished slavery, that instant the law in those states where slavery had existed giving white persons security of life, liberty and property, would attach to the enfranchised slave, where the letter of state law did not make a distinction between white and colored persons; nor do we know that this proposition has been denied in those states; but at the close of the war the constitutions and statutes of the former slave states contained provisions made during the existence of slavery discriminating in very many vital respects between white and colored persons. The history of those times tells us that it was feared that owing to the feelings and prejudices growing out of the late slavery on the part of white persons in those states, these essential rights would be denied or inadequately secured, unless a power were incorporated in the federal Constitution enabling the nation, in case such rights should be denied or invaded, to intervene for their protection. On this line of argument Judge Cooley, with all his conservatism, strongly defends the need and justice of the amendment.[6] Protection to the ex-slaves was the moving, immediate cause of the Fourteenth Amendment, and the supreme court has said that that fact must be kept in mind in its construction.[7] The court said: "An examination of the history of the causes which led

[6] Story, Constitu. Ch. 47 (5th Ed.).

[7] Slaughter House Cases, 16 Wall. 36.

to the adoption of those amendments and of the amendments themselves demonstrates that the main purpose of all the last three amendments was the freedom of the African race, the security and perpetuation of that freedom, and their protection from the oppressions of the white men who had formerly held them in slavery." This has been criticised as assigning too narrow an object to the amendment, as limiting its benefit to the colored people. It seems to me that the Supreme Court, in the words quoted, intended to give the amendment no such limitation, and only meant that its occasion should be ever kept in mind as suggesting that the national authority should not be too radical in exercising jurisdiction over the states under it—a jurisdiction beyond what was meant in its adoption, under the well-known rule that in construing statutes we must have in mind the evil to be remedied. Be this as it may, the amendment applies clearly to all, white or colored, without regard to race. In Strauder v. West Virginia[8] it is held: "The Fourteenth Amendment considered and held to be one of a series of constitutional provisions having common purpose, namely, to secure to a recently emancipated race, which had been held in slavery through many generations, all the civil rights that the superior race enjoy, and to give to it the protection of the general government in the enjoyment of such rights whenever they should be denied by the states. Whether the amendment had other, and if so, what, purposes, not decided. The amendment not only gave citizenship and privileges of citizenship to persons of color, but denied to any state the power to withhold

[8] 100 U. S. 303.

from them the equal protection of the law, and invested Congress with power, by appropriate legislation, to enforce its provisions. The amendment, though prohibitory in terms, confers by necessary implication a positive immunity, a right most valuable, to persons of the colored race—the right to exemption from unfriendly legislation against them distinctively as colored—exemption from discriminations imposed by public authority, which imply *legal* inferiority in civil society, lessen the security of their rights, and are steps towards reducing them to the condition of a subject race."

If the criticism above mentioned of the Slaughter House Cases, as tending to narrow the efficacy of the amendment to the colored race, was ever well taken, it has been dispelled by a later decision,[9] holding that "the guaranties of protection contained in the Fourteenth Amendment extend to all persons within the territorial jurisdiction of the United States, without regard to differences of race, color or nationality." In Virginia v. Rives[10] it is held that the amendment secures equal rights to all persons.

[9] Yick Wo v. Hopkins, 118 U. S. 356.
[10] 100 U. S. 313.

Chapter 8.

LIFE.

We need give no definition here. The amendment protects life and limb against attack, except only by due process of law. This concedes the right of the state to take even life under the high behest and necessity of government, provided it be taken by due process. The federal government has no pretence or color for intervention, even under the Fourteenth Amendment, in the usual enactment and administration of the state's criminal law.[1] This function of the state falls under the police power. It is by virtue of the original sovereignty of the state that she can wield the police power, inherent in the state *ab initio,* and on this power the whole criminal law of the state rests,[2] and the Fourteenth Amendment has not taken from the states the police power.[3]

"The people of a state are entitled to all prerogatives formerly vested in the king, subject only to limitations imposed by the Constitution of the nation or state. The states retain all their original powers of sovereignty, ex-

[1] Strader v. Graham, 10 How. 82.

[2] 1 McClain Crim. Law, §23.

[3] Barbier v. Connelly, 113 U. S. 27; Powell v. Pennsylvania, 127 U. S. 678.

cept so far as the Constitution vests them in the nation, or prohibits their exercise by the state." [4]

The criminal jurisprudence was never granted to the nation, and is left to the states, both because never granted away, and because of Amendment Ten saying that all powers not granted to the nation are reserved to the states.[5]

It is hardly necessary to say again that the amendment does not touch the case of the individual or mob murder, as it deals, not with acts of individuals, but only with action by the state through its constituted authorities.[6] Such murders by individuals or mobs are to be dealt with only by the states.

[4] Lansing v. Smith, 21 Am. D. 89; Blair v. Ridgely, 97 Id. 248 and note; Corn v. Erie Co., 1 Am. R. 399.

[5] McElvain v. Brush, 142 U. S. 155.

[6] Virginia v. Rieves, 100 U. S. 313; *ex parte* Virginia, Id. 339; Civil Rights Cases, 109 Id. 3.

Chapter 9.

LIBERTY.

What is its meaning as used in the Fourteenth Amendment? Does it mean merely immunity from bodily detention in a penitentiary or jail? Certainly not. So narrow a meaning to this word in a constitution, state or federal, would shear it of force and emasculate its strength to perform necessary offices, which no other provision of the constitution would perform. Its meaning in Magna Charta, and this amendment is only a repetition of that, as expounded by Blackstone, is: "Next to personal security, the law of England regards, asserts and preserves the personal liberty of individuals. This personal liberty consists in the power of locomotion, of changing situation, or moving one's person to whatsoever place one's own inclination may direct, without imprisonment or restraint, unless by due course of law." [1] This is too narrow a definition of liberty. Under the two words "life" and "liberty" Blackstone would cover personal security and personal liberty. So does the amendment. But under what Blackstone calls "personal liberty" what shall we secure under the Fourteenth Amendment? Lib-

[1] 1 Bl. Com. 134.

erty does not mean merely freedom from imprisonment of the body. Under the term "personal security" Blackstone defends "enjoyment of life, limb, body, health and reputation."[2] We can say that the words "life and liberty" in our state constitutions cover the things specified by Blackstone, but they cover more. They cover both personal security and personal liberty, I repeat. But what does the word "liberty" mean in American constitutions? This is the test question here, for it means in the Fourteenth Amendment just what it means in the state constitutions. It means personal liberty. This includes more than mere exemption from imprisonment. I should say that it means exemption or immunity from unlawful imprisonment or detention of the body, freedom to go and come on lawful business or pleasure, commonly called the right of locomotion; the right to acquire, hold and convey property; the right to make contracts and to labor in any lawful calling to earn a living; to marry and have family.

In State v. Peel Splint Coal Company[3] the author wrote as follows: "The word 'liberty,' as here used, does not mean simply exemption from bodily imprisonment, but liberty and freedom to engage in lawful business, to make lawful contracts therein, to the end of earning a livelihood for self and family, and of acquiring and enjoying property, and of obtaining happiness. The right to contract and be contracted with is indispensable to these indispensable objects. Elsewhere this great right is recognized in the constitutions by the provision that contracts

[2] 1 Bl. Com. 129.

[3] 36 W. Va. 856. See Williams v. Fears, 179 U. S. —, 21 Sup. Ct. 129.

made in its exercise shall not be impaired. It is a privilege essential to earn bread and secure happiness. Vain would be the pursuit of happiness if the right of contract necessary to secure the bread of life and raiment and home be taken away. Scarcely any of the great cardinal rights are more universally recognized and vindicated under our system, indeed, under all civilized governments, than this right of contract. A man must have the right to exercise his skill and talents and dispose of and use his labor and property in lawful pursuits as to him shall seem proper. The property right may be violated by prohibiting its full use to the owner as effectually as by taking it from him, his ownership being thus damaged."

In State v. Goodwill[4] Judge Snyder, delivering the opinion of the court, said: "The court, in People v. Gillson, says: 'The term liberty, as used in the Constitution, is not dwarfed into mere freedom from physical restraint of the person of the citizen, as by incarceration; but is deemed to embrace the right of a man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare. Liberty, in its broad sense, as understood in this country, means the right, not only of freedom from servitude, imprisonment or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation. 109 N. Y. 398; Field, J., in Butchers' Union Co. v. Crescent City,

[4] 33 W. Va. 179, 25 Am. St. R. 863 and note. *See Re* Morgan, 58 Pac. 1071 (full) and Johnson v. Goodyear, 59 Pac. 304 (full).

etc., Co., 111 U. S. 755; Association v. Crescent City Co., 1 Abb. 398. . . The property which every man has in his own labor, as it is the original foundation of all other property, so it is the most sacred and inviolable. The patrimony of the poor man lies in the strength and dexterity of his own hands; and to hinder him from employing these in what manner he may think proper, without injury to his neighbor, is a plain violation of this most sacred property. It is equally an encroachment, both upon the just liberty and rights of the workman and his employer, for the legislature to interfere with the freedom of contract between them, as such interference hinders the one from working at what he thinks proper, and at the same time prevents the other from employing whom he chooses. A person living under the protection of this government has the right to adopt and follow any lawful industrial pursuit, not injurious to the community, which he may see fit. And, as incident to this, is the right to labor or employ labor, make contracts in respect thereto upon such terms as may be agreed upon by the parties, to enforce all lawful contracts, to sue, and give evidence, and to inherit, purchase, lease, sell and convey property of every kind. The enjoyment or deprivation of these rights and privileges constitutes the essential distinction between freedom and slavery; between liberty and oppression. These principles have been fully recognized and announced in many decisions of the Supreme Court of the United States and other courts." Numerous cases are there cited.

The Civil Rights Act can be justified in every item of its grant by the clause protecting life, liberty and prop-

erty. It has been held in numerous cases, and seems well settled, that a law denying the right to contract or acquire property is an infraction of the right of liberty. "Liberty includes the right to acquire property, and that means to make and enforce contracts." [5] The Civil Rights Act was made to enforce the Fourteenth Amendment.[6]

"Constitutional liberty means not only freedom of the citizen from servitude and restraint, but includes the right of every man to be free in the use of his powers and faculties, and to adopt such avocation or calling as he may choose, subject only to the restraints necessary for the common welfare. Rights of property preserved by all constitutions is right not only to possess and enjoy it, but also to acquire it in any lawful mode, or by following lawful pursuit. The property which each citizen has in his own labor is a common heritage, and as an incident to the right to acquire other property, the liberty to enter into contracts by which labor may be employed in such way as the laborer shall deem most beneficial, and of others to employ such labor, is necessarily included in the constitutional guaranty. Right to contract is both a liberty and a property right. If any person is denied the right to contract and acquire property in the manner in which he has hitherto enjoyed it under the law, and which others are still allowed by law to enjoy, he is deprived of both the constitutional right of liberty and property." [7]

[5] Ritchie v. People, 155 Ill. 98, 46 Am. St. R. 315.

[6] Gibson v. Mississippi, 162 U. S. 580; Strauder v. West Virginia, 100 U. S. 303.

[7] Bracewell v. People, 147 Ill. 66, 37 Am. St. R. 206; Harding v. People, 160 Ill. 459, 52 Am. St. R. 344; Ruhstratt v. People, 185 Ill. 133.

The Missouri court said: "The right of life, liberty and property are grouped together in the same sentence. They constitute a trinity of rights, and each as opposed to an unlawful deprivation thereof is of equal constitutional importance. With each, under the operation of a familiar principle, every auxiliary right, every attribute necessary to make the principal right effectual and valuable in its most extensive sense pass as incidents to the original grant. The rights thus guaranteed are something more than mere privilege of locomotion; the guaranty is the negative of arbitrary power in every form which results in deprivation of right. These terms, life, liberty and property, are representative terms, and cover every right to which a member of the body politic is entitled under the law. Within their comprehensive scope are embraced the right of self-defense, freedom of speech, religious and political freedom, exemption from arbitrary arrest, right to buy and sell as others may—all our liberties, personal, civil, political—in short, all that makes life worth living; and of none of these rights can anyone be deprived except by due process of law. 2 Story, Constitu., §1950." [8]

The Supreme Court of the United States, through Justice Field, has said that the words "life" and "liberty" cover all rights which the Declaration of Independence declares all men inalienably endowed with, "life, liberty and the pursuit of happiness"; that the words included "the right of men to pursue happiness, by which is meant the right to pursue any lawful business in any manner not inconsistent with the equal rights of others, which

[8] State v. Julow, 129 Mo. 172.

may increase their property or develop their faculties, so as to give them their highest enjoyment. The common business and calling of life, the ordinary trades and pursuits, which are innocuous in themselves, and have been followed in all communities from time immemorial, must, therefore, be free in this country to all alike upon the same conditions. . . The right to pursue them . . . is an essential element of that freedom which they claim as a birthright." [9]

These principles are reiterated by the Supreme Court in a later case.[10] The New York court holds the same construction.[11]

These copious extracts from actual judgments of the courts will show how comprehensive and efficient is this word "liberty" in our state constitutions and the Fourteenth Amendment. If we did not give it such comprehensive import, it would cripple the efficacy of what was evidently designed to cover vital fundamental rights and privileges. That word alone embraces almost all the essential rights of the person, and when we add to it the provision guaranteeing equality before the law and the protection of life and property, the American freeman may boast that, so far as human providence and watch can attain, the citadel of his rights is strong and secure. I have given these extracts to show this, and also because they will be very aidful as outlines of general principles in the practical daily application of the provisions of the constitution, state and federal.

[9] Butchers' Union v. Crescent City, 111 U. S. 757.
[10] Allgeyer v. Louisiana, 165 U. S. 578.
[11] People v. Warden, 157 N. Y. 116, 43 L. R. A. 264.

CIVIL RIGHTS ACT.

Under authority of the Fourteenth Amendment Congress enacted the statute called The Civil Rights Act.[12] It gives every person within the national jurisdiction "the same right" to contract, sue, give evidence, have the benefit of all laws for security of person or property, and to acquire and transfer property, "as is enjoyed by white persons." The rights here spoken are most essential. Its moving occasion was undoubtedly the discrimination made and actually existing in some of the states against colored people in the matters of contracting, holding and conveying property, suing and giving evidence. It might seem that this act would fall under the ban placed by the Supreme Court in the Civil Rights Cases upon another act, the act admitting colored persons into inns and theatres, on the score that it is original, general legislation, such as is appropriate to state legislatures, and not to Congress; but, as just stated, there were actual laws disabling colored people from the enjoyment of the rights above mentioned, and, therefore, the Civil Rights Act is congressional legislation actually called for to counteract and neutralize existing state legislation deprivative of rights protected by the amendment, and not general legislation anticipatory of problematical hostile state legislation, and, therefore, not like the act condemned in the Civil Rights Cases.

While slavery prevailed these civil rights were denied to slaves, and necessarily so, because they are rights of self-dependent freemen, not harmonious with slavery, and

[12] Rev. St. §§1977, 1978.

would be prejudicial to its stability; and furthermore such rights were not essential to slaves, because their masters were bound to support them, and they needed no right to contract or have property. They had no civil rights, no right to sue in any court any person.[13] They could need only right to give evidence for self-protection, or laws for protection of person; but while laws did protect them against murder, mayhem or cruel chastisement, slavery would naturally exclude the full law of personal protection. When, however, slavery was eradicated, root and branch, by the Thirteenth Amendment, it became essential and indispensable that these rights should be accorded the former slaves. Without these great fundamental privileges the freeman is not a real freeman. He can not without them earn the bread of life for himself and family, nor find happiness. Without them vain would be his pursuit of it. These rights are privileges of the highest cast. Their concession was the main object of the Fourteenth Amendment. It was designed to destroy and prevent state laws denying them, and enforce their recognition by the states. One bereft of the great rights of giving evidence, contracting, suing, having the benefit of laws for the protection of person and property, and right to acquire and transfer property, has in no sense the equal protection or benefit of the law, and would be subject to the most hurtful discrimination as to indispensable privileges and rights. Besides, this deprivation would be a badge of humiliation and degradation before the eyes of his fellows. He would wear the mark of Cain. Such rights, under the Civil Rights Act, belong to all freemen.

[13] Peter v. Hargrave, 5 Grat. 12.

Chapter 10.

PROPERTY.

The Fourteenth Amendment protects property, as well as life and liberty, against undue state action. Its importance as the stay of life and the comfort of the liberty of a freeman need not be here enlarged upon. It is next in importance only to life and liberty. The same general principles above stated as applicable to life and liberty here also apply, and will not be repeated.

What is Property?—A definition is hardly necessary. Anything in which the law allows ownership by man is property under this amendment. It may be real, personal or mixed; it may be corporeal or incorporeal; a franchise, contracts, ready money, a demand for money enforceable by action, based on contract or tort, in short, anything capable of beneficial ownership. It is no matter what the estate is, in fee simple, fee tail or conditional, for life, years, at suffrance or will. Is it property substantial? That is enough. It must, however, be vested property, "lawfully vested," recognized by law to be protected under federal or state constitution.[1]

[1] N. Orleans v. Water Company, 142 U. S. 79; Taylor v. Beckham, 20 Sup. Ct. 890, 178 N. S. 548; Essex, etc., Skinkle, 140 U. S. 334.

Reputation or Character.—Is this protected by the amendment? This is, according to Blackstone, a part of "personal security."[2] The amendment protects life, liberty, property, but reputation is not named. Does it savor of any of the things protected in letter? Can this great attendant of the person be considered as neglected by Magna Charta, whether found in state or federal constitutions? Is it a part of life, or liberty, or property? Like them it follows the person. Shakespeare makes it savor of life itself, for he makes Othello ask,

> What dost thou mean?

Iago responds:

> Good name, in man and woman, dear my lord,
> Is the immediate jewel of their souls.
> Who steals my purse, steals trash; 'tis something, nothing,
> 'Twas mine, 'tis his, and has been slave to thousands;
> But he who filches from me my good name
> Robs me of that which not enriches him,
> And makes me poor indeed.

I would not think that reputation savors of life, so as to be protected as part of life, though dear as life itself. I would make it to savor of property, though Shakespeare does not rank it with property, because rising in sacredness above it, as it does in the eye of divine philosophy, in religion and in the moral code. Whether it falls at all under the amendment is a query under the case of Abbot v. National Bank, decided in the United States Supreme Court December 11, 1899.

Public Office.—It is not property. It a mere trust held by the incumbent for the public benefit, and the exercise of governmental power in removal from office does

[2] 1 Bl. Com. 129; Morton v. Nebraska, 21 Wall. 660.

not violate the Fourteenth Amendment. A very important case has just been decided by the United States Supreme Court, Taylor v. Beckham.[3] Taylor was elected governor of the state of Kentucky over Goebel, and Marshall was elected lieutenant governor over Beckham, as declared upon the face of the returns by the state canvassing board; but a contest was instituted by Goebel before the state legislature pursuant to the state constitution, to contest Taylor's election, and this contest resulted in a declaration by the legislature that Goebel had been elected governor and Beckham lieutenant governor. Taylor having taken the oath of office was exercising that office, and Goebel having in the meantime died, Beckham, having taken the oath of office as governor, he instituted in a state court an action of *quo warranto,* claiming that Taylor was usurping the functions of governor, without lawful right, and claiming that he, Beckham, was the lawful governor, and seeking to have Taylor's title to the office adjudicated to be bad. The case went to the Kentucky Court of Appeals, and was decided in Beckham's favor, and thence went to the United States Supreme Court.

So far as concerns this work, the case involved the question whether the action of the Kentucky legislature and court deprived Taylor of office without due process of law in violation of the Fourteenth Amendment. Both the state and the United States Supreme Courts held against that contention, deciding that a public office is not property, and deciding further that the action of the state legislature, under the constitution and laws of Ken-

[3] 178 U. S. 548, 20 Sup. Ct. 899; Taylor v. Beckham (Ky.), 49 L. R. A. 258.

tucky, in passing upon the contested case before it, was final, as a court of sole and exclusive jurisdiction in that matter under state constitution and law, touching a contest for a state office. The state court used this language in its deliverance of judgment: "The office of governor being created by the constitution of this state, the instrument creating it might properly provide how the officer was to be elected, and how the result of this election should be determined. The provisions of the Constitution on this subject do not abridge the privileges or immunities of the United States. Such an office is not property, and in determining merely the result of the election, according to its own law, the state deprives no one of life, liberty or property. In creating this office the state had a right to provide such agencies as it saw fit to determine the result of the election, and it had a right to provide such a mode of procedure as it saw fit. It is wholly a matter of state policy. The people of the state might, by an amendment to their constitution, abolish the office altogether. The determination of the result of an election is purely a political question, and if such suits as this may be maintained, the greatest disorder will result in the public business. It has always been the policy of our law to provide a summary process for the settlement of such contests, to the end that public business shall not be interrupted; but if such a suit as this may be maintained, where will such a contest end?"

The Supreme Court of the United States, through Chief Justice Fuller, said: "It is obviously essential to the independence of the states, and to their peace and tranquillity, that their power to prescribe the qualifica-

tion of their own officers, the tenure of their offices, the manner of their election, and the grounds on which, the tribunals before which, and the mode in which, such elections may be contested, should be exclusive and free from external interference, except so far as plainly provided by the Constitution of the United States. And where controversies over the election of state officers have reached the state courts in the manner provided by, and been there determined in accordance with, the state constitutions and laws, the cases must necessarily be rare in which the interference of this court can properly be invoked." The Chief Justice further said that "The view that public office is not property has been generally entertained in this country," citing cases, and went on to say: "The decisions are numerous to the effect that public officers are mere agencies or trusts, and not property as such. Nor are the salary and emoluments property, secured by contract, but compensation for services actually rendered. Nor does the fact that a constitution may forbid the legislature from abolishing a public office or diminishing the salary during the term of the incumbent change its character or make it property. True, the restrictions limit the power of the legislature to deal with the office, but even such restrictions may be removed by constitutional amendment. In short, generally speaking, the nature of the relation of a public officer to the public is inconsistent with either a property or a contract right," citing numerous cases.

The above case is another of innumerable instances in the past and to come where the Fourteenth Amendment has been and will be claimed to be a panacea for

all imaginable wrongs done by state action. I can not see how, with any show of plausibility, so far as a federal question is concerned, it could be claimed that the federal government had anything to do with the decision of an election for governor of a state. If the federal government can thus interpose and decide who are entitled as state officers to administer its government, then there is not a vestige of state sovereignty, autonomy or self-government left to the states. The Fourteenth Amendment means no such thing. It would be a perversion of its true intent. The United States Supreme Court has in no case lent countenance to such a contention.

INDEPENDENCE OF STATE GOVERNMENTS.

In the case of Taylor v. Beckham, just cited, the supreme court lays down a cardinal principle of overruling importance, ever to be observed as indispensable to the independence of the state governments. The court says that the guarantee of republican form of government in the federal Constitution does not give the Supreme Court jurisdiction to review action of the highest court of a state sustaining the election of governor by state legislation under the state constitution, on the ground that such decision denies the right of the people to choose their own officers, where the legislative, executive and judicial departments of the state are peacefully operating by the orderly and settled methods prescribed by state fundamental law, notwithstanding there may be difficulty and disturbances arising from the pendency of election contests.

Waste of Natural Gas.—The common law maxim is, *Cujus est solum, ejus est usque ad coelum.* This gives to the owner of the soil everything beneath the surface, natural gas and oil in place being part of the freehold, and thus belong to the owner of the surface. That owner may bore into the surface, and the gas or oil he gets, though it may have come from another man's land, is absolutely his, without right of reclamation in his neighbor. Why, then, can not the owner waste, as well as sell or give away, his gas? But this property in these fugacious subjects, gas and oil, is not that absolute property which the owner has in the fixed soil. There is a difference. He owns under this maxim the water flowing in streams through his land, but owns it only in a sense. He may use it as he really needs it, but can not waste it likely, can not deter it from going to a neighbor for his comfort. The state may prevent him. So gas may be actually reduced to possession by boring through the surface by the surface owner; this can not be prevented; his right of property in the gas goes thus far. If he does not do this, he has no shadow of right to the gas in another's land. We know that gas and oil are stored in deposits in the earth, and that wells bored, if they strike the reservoir, will bring up this gas and oil. We know too that the gas is fugitive, comes from the land of others to the vents produced by the wells. It belongs not to one, but to all, in a sense; not so far as to prevent the owner of a given farm from reducing it to possession for his reasonable use, like animals *ferae naturae,* but so far as to say that such owner should not be allowed to wantonly waste it to the injury of another.

So use your own that you do not injure another. The state can prevent your so using your land that you shall not burn the property of another or take from him light and air. The interest of adjoining proprietors is such as to call for a restraint, just as it would prevent the waste of flowing water.

But there is a stronger reason to warrant legislation found in some of the states against the waste of natural gas, the public interest in its reasonable preservation for public consumption. To justify this state interference natural gas has been likened to animals *ferae naturae*. By common law they belonged to no man. Though on the soil of an owner, he has no more right to them than another. He may prohibit me from coming upon his land to take them, but he no more owns them than I. He may take them for his reasonable use; so may I. They really belong to the public. They have been so recognized by man from the moment when God gave man dominion over them, as told in Genesis. The Roman, Greek and common law made these animals separate from the soil on which they chanced to be for the time. There never has been a time when the state did not exercise a control, a power of police regulation over these animals, or some of them, called game, to save them from rapid destruction for public good. So with gas. The owner may take it for his actual use, but the state may prevent its waste, for public weal, to prevent its exhaustion. Over running water, over wild animals, over gas, there is police power in the state, based on the same principle, public welfare, only to be exercised in different modes, according to the differing nature of the matter.

In Ohio Coal Company v. Indiana[4] Justice White gives us a learned discussion of this important subject, to which I call special attention for the underlying principles. He asserts the right of the state to prevent such waste on the ground that it may regulate one man's use of his property in order that he may regulate one man's use He says: "On the other hand, as to gas and oil, the surface proprietors within the gas field all have equal right to reduce to possession the gas and oil beneath. They could not be absolutely deprived of this right, which belongs to them, without a taking of private property. But there is a coequal right in them all to take from a common source of supply the two substances, which in the nature of things are united, though separate. It follows from the essence of their rights, and from the situation of the things as to which it can be exerted, that the use by one of his power to seek to convert a part of the common fund to actual possession may result in an undue proportion being attributed to one of the possessors of the right, to the detriment of others, or, by the waste by one or more, to the annihilation of the rights of the remainder. Hence it is that the legislative power, from the peculiar nature of the right and the objects upon which it is to be exercised, can be manifested for the purpose of protecting all the collective owners by securing a just distribution, to arise from the enjoyment by them of their privilege to reduce to possession, and to reach the like end by preventing waste." The case holds that such

[4] 177 U. S. 90. *See* State v. Ohio Oil Co., 150 Ind. 21, 47 L. R. A. 627.

a statute does not deprive one of property without due process of law contrary to the Fourteenth Amendment.

Game Preservation.—How do you justify the game laws found in all the states? Are not the deer, pheasants, quail, turkeys and fish on my land my property? How can you prevent my taking or wantonly destroying them at any season in any way? Genesis says that God gave dominion over them to man. This means a common heritage. They are separated from the land; they are not appurtenant to it. The dawn finds them on my land; the meridian, on yours; and the evening, on another's; and I have no right to reclaim them. Greece, Rome, England treated them as not individual property, but as belonging to the public. Man parcelled out earth into individual, exclusive ownership; but all authorities say he did not parcel out these fugitive things of wild nature. They belong to the state in trust for general weal, and this brings them under state police power of restraint and regulation.[5] This is fully sustained by the practice of centuries in Europe and America. All states have laws to prevent the extinction of game. The Fourteenth Amendment did not nullify this power. This doctrine is sustained in Geer v. Connecticut[6] in an interesting opinion by Justice White. In that case the state act was sustained, though it prohibited at all times the killing of certain game for transportation out of the state, but did not make the mere killing of the game unlawful.

State Law as to Contracts and Property.—Notwithstanding the generality of the principles above stated as to re-

[5] Lawton v. Steel, 152 U. S. 138; Stevens v. State, 89 Md. 669.
[6] 161 U. S. 519. See *In re* Eberle, 98 Fed. 295.

straint upon state action infringing the right of contract and acquisition of property, it is to be remembered that the states under the police power, which is not taken away from them by the Fourteenth Amendment, may pass laws to regulate the validity and formation of contracts, wills, conveyances and the acquisition and disposal of property. Such laws, prohibiting certain contracts, unless infringing on interstate commerce or restrictive of the federal government in contracting in the performance of its appointed functions, are not repugnant to the amendment.[7]

INTERSTATE COMMERCE.

Speaking of the interstate commerce clause, which gives Congress power "to regulate commerce with foreign nations, and among the several states", it is not intended in this work to discuss that vastly important clause, nor refer to it except incidentally as it bears sometimes on matters discussed under the Fourteenth Amendment. It may be appropriately said, however, as it bears somewhat on the amendment, as just suggested, that the commerce clause is an affirmative, positive grant by the states to Congress in the original Constitution, of absolute and plenary power to legislate upon such commerce in all things and respects essentially affecting it or that may affect it, unlike the Fourteenth Amendment, which is a mere prohibition upon the states, not a grant of original jurisdiction. In the case of commerce, Congress has power of original and exclusive legislation; under the Fourteenth

[7] Budd v. New York, 143 U. S. 517; Hooper v. California, 155 Id. 648; Opinion of Justices in 163 Mass. 589.

Amendment its powers do not cover right of primary legislation upon the subjects mentioned in it, to prescribe a full code of enactment upon the multitudinous matters of privilege, immunities, life, liberty and property, but only such restrictive legislation as may veto undue legislation or action by the states on those subjects. As commerce largely concerns the states, the federal decisions seem to say that the commerce clause does not wholly bar out state legislation affecting it by virtue of the police power, for instance; and states may lawfully legislate thereon in so far as the commerce affects them, but when Congress passes an act of regulation touching such commerce, it excludes after conflicting state legislation, and supplants and nullifies antecedent conflictive state legislation, because that which is not supreme must yield to that which is supreme. "The cases in which legislation by Congress supersedes that of states without specific provision to that effect, are those in which the same matter is the subject of legislation by both.[8]

Trusts and Monopolies.—There are innumerable decisions of the Supreme Court upon this commerce clause. But what has it to do with the Fourteenth Amendment? That amendment does not grant, but defends "liberty" against undue state action. It is later than the commerce clause. Does it guarantee absolute liberty of contract? Does it repeal old law forbidding certain contracts, or forbid new law condemning such

[8] Gibbons v. Ogden, 9 Wheat. 1; *In re* Debs, 158 U. S. 564; Mobile v. Kimball, 102 Id. 691, 697; Morgan v. Louisiana, 118 U. S. 455, 465; Covington Bridge Co. v. Kentucky, 154 U. S. 209; Davis v. Beason, 133 U. S. 333; Addyston Pipe Co. v. U. S. 175 U. S. 211.

contracts as may be considered hurtful to the public? Does it defend trusts, contracts made by trusts hurtful to interstate commerce, so that Congress can not prohibit them? It certainly does not do this; for the amendment does not at all restrain Congress— it only restrains states; but Amendment Five, in the same words, restricts the power of the nation. In a late case the Supreme Court concedes that this word "liberty" found in both amendments is not confined to mere liberty of body, but among others includes a right to enter into certain classes of contracts to enable the citizen to carry on business; but it was held that it does not prevent Congress from prohibiting contracts in the carrying on of commerce, which directly and substantially regulate commerce among the states, or agreements or combinations which directly operate, not alone on manufacture, but on the sale, transportation and delivery of articles of interstate commerce by preventing or restricting their sale, and tend to restrain the manufacture, purchase, sale or exchange of articles among the states, and enhance the value of such articles, and that when the effect of such contract or combination among dealers in a commodity is enhancement of its price, it restrains trade in it, even though contracts to buy it at the enhanced price are being made. The court held that the contracts violated the act "to protect trade and commerce against unlawful restraints and monopolies," July 2, 1890, Chapter 647. ("Antitrust Law.")[9] . . . The case cited holds that the nation has no power over commerce done wholly within the state, nor over monopo-

[9] Addyston Pipe Co. v. U. S., 175 U. S. 211. *See also* Addyston Pipe Co. v. U. S., Dec. 1899, U. S. Sup Court; Williams v. Fears, 179 U. S. —, 21 Sup. Ct. 129.

lies or combinations injuring it. The states possess power to regulate, protect and defend *intra*-state commerce, and can pass healthful legislation to prevent unlawful combinations, monopolies or trusts under its police power, and consequently may, as Congress can in *inter*-state commerce, condemn any contract which prejudices it, without violating liberty as protected by the Fourteenth Amendment. Even if the police power were for the first time applied to forbid certain contracts or agreements detrimental to public welfare, it would not violate the amendment because a contract once not hurtful and lawful, may, in course of time, become hurtful, and then be prohibited. But the truth is this question does not arise as to laws to protect the public against monopolies, agreements between persons or corporations having effect to enhance the price to the public of necessary articles or labor, including buying them up, "cornering" them and reselling them at great price; for centuries ago the common law and old statutes branded as indictable offences these things, calling them "forestalling," "regrating" and "engrossing." Forestalling is "the buying or contracting for any merchandise or victual coming in the way to market; or dissuading persons from bringing their goods or provisions there; or persuading them to enhance the price of them when there." Regrating is "the buying of corn or other dead victual, and selling it again in the same market, or within four miles of the place." Engrossing is "the getting into one's possession by buying up of large quantities of corn or other dead victuals with intent to sell them again. And so the total of engrossing of any other commodity, with intent to sell it at an unreasonable price, is

an offence indictable and finable at common law.[10] Mr. Bishop says[11] that these offences exist today where the common law prevails not supplanted by statute, and that remedies against combinations exist under this old law. He says the old offence of engrossing, that is, buying up by monied men of vast quantities of necessaries and selling at large prices is an offence at common law, and those who do so are enemies of the race and deserve punishment as thieves and robbers. I do not say that all those things would now be offences, as in the days when necessaries were only allowed to be sold in market overt; but I do say that agreements and combinations to enhance prices of them, or having that natural tendency, are offences against the common law above stated. Mr. Bishop asserts, as I do, the efficiency of the common law to redress evils of the present day in hurtful trust combinations. A Michigan decision so holds.[12] If the legislatures fail to pass statutes against them, the common law largely applies for remedy.

I refer to this common law to show that the law from ancient days condemned these combinations, and punished them as public offences. It also condemned every contract in restraint of trade, as agreements not to carry on the same business as another at any place. In 44 Elizabeth a grant of a monopoly to make playing cards was held void, because a monopoly against common law and old acts of parliament. In 1610 James I. forbade anyone to ask a monopolistic grant.[13]

[10] 4 Blackstone's Com. 158.

[11] New Cr. L. §522.

[12] Raymond v. Levitt, 46 Mich. 450.

[13] Brewer v. Marshall, 19 N. J. Eq. 537; Newburyport Co. v. City, 103 Fed. 584.

A statute of James declared all grants of monopolies void.[14] Therefore, before any of our state constitutions or the amendment were known this prohibition of the law existed, and it is utterly untenable to contend that any statute passed to prevent such combinations, reasonable to the end, can not be passed consistently with constitutional provisions prohibiting deprivation of liberty or property without due process of law. A late case held an Act of Missouri preventing pools, trusts and conspiracies to control prices not violative of the Fourteenth Amendment as depriving of liberty of contract. Seventy-three insurance companies combined to regulate, fix and control the premium or price of fire insurance, and their right to do business in the state was declared forfeited for so doing. The case decides that the constitutional guaranty of life, liberty and property does not include right of insurers to agree among themselves to maintain rates; that an insurance company can not acquire a vested right by complying with existing police regulations, which can not be affected by subsequent change of law. State v. Firemen's Ins. Co., 45 L. R. A. 363.

It is not within the boundary of this work to define what combination is one in restraint of trade, or against public policy, or what may be legislated against. This is largely within the legislative judgment. The subject will be found elaborately discussed in cases cited in the footnote.[15]

[14] 7 Bacon's Abridgmt. 22.

[15] U. S. v. Addyston, 54 U. S. App. 723, 85 Fed. 271, 29 C. C. A. 141, 175 U. S. 211; U. S. v. Trans-Missouri, 166 U. S. 290; U. S. v. Joint-Traffic Association, 171 U. S. 558; Transportation Co. v. Pipe Line Co., 22 W. Va. 600. Full note, 1 Am. and Eng. Dec. Eq. 604. McMullen v. Hoffman, 174 U. S. 639.

These trusts and monopolies have never been favored in law. There was an agreement in 1844 between owners of boats on canals to regulate freight by uniform scale to be fixed by a committee and divide profits proportionally to boats used by the trust parties, and binding members not to engage in the business outside the association. Held that the tendency was to increase rates of freight and repress competition, and that the agreement was void.[16]

A trust combination was held void in State v. Standard Oil Company.[17] The great combination known as "The Sugar Trust" was held void, and it was decided that such an unlawful agreement would justify the forfeiture of the charter of a corporation engaging in it.[18] The judgment in the case was affirmed on the theory that the combination was a contract *ultra vires,* and therefore unlawful, but the forfeiture feature was not insisted upon.[19] The act of Congress, 2 July, 1890, "to protect trade and commerce against unlawful restraints and monopolies," is broad: "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce, among the several states, or with foreign nations, is hereby declared to be illegal."

I insert as a sample the New York act:

CHAPTER 383 OF THE LAWS OF 1897.

"SECTION 1.—Every contract, agreement, arrangement or combination whereby a monopoly in the manufacture,

[16] Stanton v. Allen, 5 Denio, 434.
[17] 49 Ohio St. 137.
[18] People v. Sugar Refining Co., 54 Hun, 354.
[19] 121 N. Y. 582.

production or sale in this state of any article or commodity of common use is or may be created, established or maintained, or whereby competition in this state in the supply or price of any such article or commodity is or may be restrained or prevented, or whereby for the purpose of creating, establishing or maintaining a monopoly within this state of the manufacture, production or sale of any such article or commodity, the free pursuit in this state of any lawful business, trade or occupation is or may be restricted or prevented, is hereby declared to be against public policy, illegal and void.

"SECTION 2.—Every person or corporation, or any officer or agent thereof who shall enter into any such contract * * * is guilty of a misdemeanor, and on conviction thereof shall, if a natural person, be punished by a fine not exceeding $5,000, or by imprisonment for not longer than one year, or by both such fine and imprisonment, and, if a corporation, by a fine not exceeding $5,000.

"SECTION 3.—The attorney-general may bring an action in the name and in behalf of the people of the state against any person, trustee, director, manager or other officer or agent of a corporation, or against a corporation, foreign or domestic, to restrain and prevent the doing in this state of any act herein declared to be illegal, or any act in, toward or for the making or consummation of any contract, agreement, arrangement or combination herein prohibited, wherever the same may have been made.

"SECTION 7, of the Stock Corporation Law, which provides: 'No stock corporation shall combine with any other corporation or person for the creation of a monopoly or the unlawful restraint of trade or for the prevention of competition in any necessary of life.'"

Monopoly Grants.—It is aside from the purpose of this work to discuss this subject; but it is not improper to say, in short, that the legislature of a state, unless forbidden by its constitution, may grant to persons or corporations sole and exclusive right to carry on a business, and such grant is deemed a contract within the meaning of that clause of the federal Constitution prohibiting a state from making or enforcing any law which impairs the obligation of contracts; and therefore a repeal, or hurtful modification, of such grant by legislative act would be repugnant to that provision of the federal Constitution. I think, too, that where such exclusive grant exists, it would be not merely a contract, but a vested property right, and so any invasion of it without due process of law, by any kind of state action, would be repugnant to the Fourteenth Amendment. A grant of such exclusive privilege by a municipal corporation would be likewise a contract and property, as if granted by the legislature, provided that the power to make such a grant is expressly vested in the municipality by its charter or state law; for it has no such implied power.[20] But we must remark with emphasis that such exclusive grants are, if not odious, certainly strongly disfavored by the law, and nothing but

[20] Dartmouth College v. Woodward, 4 Wheat. 519; Slaughter House Cases, 16 Wall. 36; Mason v. Bridge Co., 17 W. Va. 396; Grand Rapids v. Grand Rapids, 20 Am. and Eng. Corp. Cas. 270, 291; Parkersburg Gas Co. v. Parkersburg, 30 W. Va. 435, 4 S. E. R. 650; Electric Co. v. Traders Co., 47 W. Va. —, 35 S. E. 994; New Orleans Water Co. v. Rivers, 115 U. S. 674; St. Tammany Waterworks v. N. O. Waterworks, 120 U. S. 64; N. O. Gas Co. v. Louisiana Light Co., 115 U. S. 650, 10 Am. and Eng. Corp. Cas. 639; Louisville Gas Co. v. Citizens Gas Co., 115 U. S. 683, 10 Am. and Eng. Corp. Cas. 671; Detroit Street R. R. Co. v. Railway Co., 171 U. S. 48.

express words conferring such exclusive privileges will confer them. The presumption is always strong that the legislature, or the municipal corporation, which is claimed to have granted such monopoly, did not intend to do so, did not intend to part with the sovereign right of control over such matters, did not intend to part with power so essential to the public good, and it must be clear beyond all question that the act claimed to vest such exclusive right does in fact do so in letter.[21] A general act forbade the grant of a ferry within half a mile of another. Held that the first grant was no contract preventing another.[22]

[21] Charles River Bridge v. Warren Bridge, 11 Pet. 420; Cooley, Const. Lim. 394; Syracuse Water Co. v. City, 116 N. Y. 167, 29 Am. & Eng. Corp. Cas. 307; Parkersburg Gas Co. v. Parkersburg, 30 W. Va. 435, 4 S. E. 650; Wheeling Bridge Co. v. Bridge Co. 34 W. Va. 155, 138, U. S. 287; Lehigh Water Co. v. Easton, 121 U. S. 391; Power v. Village, 10 Am. & Eng. Corp. Cas. 54.

[22] Williams v. Wingo, 20 Sup. Ct. 793, 177 U. S. 601.

Chapter 11.

DUE PROCESS OF LAW.

We must note that the federal and state constitutions do not unconditionally say that no person shall be deprived of life, liberty or property under any circumstances. If they did, the state and federal governments would be utterly powerless to execute their functions; bereft of sovereign powers, there would be no sanction to protect life, liberty or property, or enforce any law. The American colonies, when they became free at the close of the Revolution, were free republics, sovereignties, possessing all the powers of government over their territory which before had been vested in the British king and parliament—a power which was omnipotent.[1] They could, therefore, do anything with the inestimable rights of life, liberty and property which they might choose, and could do so now were it not for the restraints and prohibitions upon their power imposed by their own and the national constitutions. This omnipotent power to invade life, liberty and property is restrained by the con-

[1] New York v. Miller, 11 Peters, 102; Lansing v. Smith, 21 Am. D. 89.

stitutional provision that the states shall not take them, nor shall the nation, without due process of law. This is the badge of American freedom. These restraints are, as regards the states, exceptions from their original inherent, supreme, sovereign powers, rather than grants of powers. With Henry VIII or Louis XIV, or others of the many tyrants who have cursed the peoples, and who are pilloried in history as dark and sombre faces in the galaxy of infamy, it was simply "L'etat c'est moi," "I am the State," and life ended at their mere personal mandate; but with us, and in England now, the only king that can issue the death warrant is "Due process of law"—the voice of the law of the land, the will of the people spoken under the majesty of law. It becomes, then, all the time, all over the Republic, time and time again, indispensable to ascertain what is this "due process of law" which alone makes the mighty warrant to justify government in destroying liberty or property, and even life.

What is Due Process of Law?—None but general definition is possible; but copious extracts from authority of general statements will, in almost every case, solve the question. Justice McKenna said: "What it is for a state to deprive a person of life, liberty or property without due process of law, is not much nearer to precise definition today than it was said to be by Justice Miller in Davidson v. New Orleans, 96 U. S. 97. In that case the court suggests the difficulty and danger of attempting an authoritative definition of what it is for a state to deprive a person of life, liberty or property without due process of law, within the meaning of the Fourteenth Amendment, and

holds that the annunciation of the principle which governs each case as it arises is the better mode of arriving at a sound decision."[2] In the Davidson Case it is held that "due process of law" and "law of the land" are the same in meaning.

The great constitutional lawyer and statesman, Daniel Webster, gave a general definition of due process often quoted: "By the law of the land is most clearly intended the general law, which hears before it condemns; which proceeds upon inquiry and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property and immunities under the protection of general rules which govern society. Every thing which may pass under the form of an enactment is not law of the land."[3] As applied to matters of judicial nature this definition and the one given in 2 Kent's Commentaries,[4] are correct. Kent's definition is as follows: "The better and larger definition of due process of law is that it means law in its regular course of administration through the courts of justice."

Coke says that "law of the land" is that which is according to "the old law of the land; that is, by the due course and process of law."[5]

"It is sufficient to say that by due process of law is meant one which, following the forms of law, is appropriate to the case and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by law;

[2] Orient Ins. Co. v. Daggs, 172 U. S. 557.
[3] Dartmouth College Case, 4 Wheat. 581.
[4] 2 Kent's Com. 13.
[5] Coke's Inst. 46.

it must be adapted to the end to be attained, and wherever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justness of the judgment sought. The clause, therefore, means that there can be no proceeding against life, liberty or property which may result in deprivation of either, without the observance of those general rules established in our system of jurisprudence for the security of private rights."[6]

"The good sense of mankind has at length settled down to this: that they (the words "due process of law") were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice."[7]

Judge Tucker said: "The meaning of these words is that no man be deprived of his property without being heard in his own defense."[8]

"Due process of law undoubtedly means in the due course of legal proceedings according to the rules and forms established for the protection of private right," said Judge Edwards.[9] This is an excellent short definition. It requires only what is demanded by the usual general law according to the nature of the particular matter in hand, but that it does require, and will not tolerate unusual or arbitrary action.

[6] Hagar v. Reclamation Dist. 111 U. S. 701; Marchant v. Penn. R. R. Co. 153 U. S. 387.

[7] Johnson, J. in Columbia Bank Okely, 4 Wheat. 235.

[8] Kinney v. Beverly, 1 Hen. & Munf. 531.

[9] Westervelt v. Gregg, 12 N. Y. 209.

"A general public law equally binding on all."[10]

"Due process of law is process due according to the law of the land. This process in the states is regulated by the law of the state. Our power over that law is only to determine whether it is in conflict with the supreme law of the land—that is, with the Constitution or laws of the United States, or with any treaty."[11]

Justice Matthews said: "Due process of law in the latter (fifth) amendment refers to that law of the land which derives its authority from the legislative powers conferred on Congress by the Constitution of the United States, exercised within the limits therein prescribed, and interpreted according to the principles of the common law. In the Fourteenth Amendment, by parity of reasoning, it refers to that law of the land, in each state, which derives its authority from the inherent and reserved powers of the state, exercised within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and the greatest security for which resides in the right of the people to make their own laws and alter them at their pleasure."[12]

When a party has been fully heard in the regular course of judicial proceedings, an erroneous decision of a state court does not deprive the unsuccessful party of his property without due process of law.[13]

[10] Bank v. State, 24 Am. D. 517, and note 537.

[11] Walker v. Sauvinet, 2 Otto, 90.

[12] Hurtado v. People, 110 U. S. 516.

[13] Laidley v. Land Co. 159 U. S. 103; Marchant v. Pa. R. R. Co. 153 Id. 380.

The very words "due process of law" are self-explanatory, a definition in themselves. In Anderson v. Henry[14] the author said in delivering the court's opinion, holding a distress warrant for rent to be due process, and consistent with the Fourteenth Amendment: "That amendment is not the scarecrow it is often represented to be; it does not overthrow state laws, rights and remedies to the extent and purposes for which it is often cited. It respects the common law, the statute law, the remedies and proceedings existing in the state at its adoption. It came to preserve, not to destroy existing rights."

If the proceeding, whatever it be, is a due proceeding according to the established law, usual and proper in the particular matter, it is due process and does not violate the amendment.[15]

It will appear from the above general definition that what was due process long before the amendment came continues to be such. The amendment only gives the federal government power to enforce the right of due process. The definition is the same as before.[16]

New Laws.—It does not follow from what has just been said, that what was due process when the Fourteenth Amendment was adopted remains such, that, therefore, such prior law is the *only* due process, and that laws made *after* its adoption are not due process of law. If that

[14] 31 S. E. 998, 45 W. Va. 319.

[15] State v. Sponaugle, 43 L. R. A. 727, 32 S. E. 283, 45 W. Va. 415; Munn v. Illinois, 94 U. S. 113; Lowe v. Kansas, 163 U. S. 81; Hallinger v. Davis, 146 U. S. 314; Hurtado v. California, 110 U. S. 516; Dent v. West Va. 129 U. S. 114; Fallbrook v. Bradly, 164 U. S. 112.

[16] Eames v. Savage, 52 Am. R. 751.

were so, it would tie the hands of the states from all new legislation, and bar the courts from new procedure demanded by changing conditions in process of time. The statement in State v. Sponaugle, *supra,* is that "the amendment does not define due process of law. What was such before its adoption continues such. It does not prohibit a state from future new legislation, action or proceeding necessary in its judgment in the administration of its government, so it bears alike on all similarly circumstanced, and be not unusual, oppressive or arbitrary action, assailing the essential rights of the person."[17]

"Due process implies, at least, conformity to natural and inherent principles of justice, and forbids the taking of private property without compensation, or the condemnation of anyone in person or property without opportunity to be heard in his own defense." . . .

Trial without Indictment.—It is not sufficient to brand a procedure as not due process because never till then practised.[18] This is shown by several cases holding that a state constitution dispensing with indictment for felony and trying it on information is consistent with the demand of due process.[19]

Number of Jurors.—This is further shown by decisions that a state may, by its constitution, make a jury to consist of less than twelve, without violating the Fourteenth Amendment.[20]

[17] Holden v. Hardy, 169 U. S. 366, 18 Sup. Ct. 383.

[18] Same case.

[19] Hurtado v. California, 110 U. S. 537; Maxwell v. Dow, 176 U. S. 581; Bolln v. Nebraska, 176 U. S. 83; Brown v. New Jersey, 175 U. S. 176; Hodson v. Vernval, 168 U. S. 262; Davis v. Burke, 179 U. S. 399, 21 Sup. Ct. 210.

[20] Maxwell v. Dow, 176 U. S. 581; State v. Bates, 14 Utah, 293, 43 L. R. A. 1; Walker v. Sauvinet, 92 U. S. 90.

There can be no question that in both civil and criminal cases, under Articles 5 and 7 of amendments to the federal Constitution, and under state constitutions guaranteeing trial by jury, a jury must consist of twelve, unless a state constitution otherwise provides. The reason is that a jury by the common law consists of twelve, and when the constitutions simply give the jury right they mean the common law jury of twelve. Unless a state constitution does provide otherwise, a trial by a jury of less than twelve in cases such as require a jury, would not be due process of law, and the judgment would not be good under the state constitutions.[21] A right of jury trial is not a federal right in a state court, as Walker v. Sauvinet, *supra,* shows.

Nature of the Case.—"In judging what is due process of law respect must be had to the cause and object of taking, whether under the taxing power, or the power of eminent domain, or the power of assessment for local improvements, or none of these, and if found to be suitable or admissible in the special case, it will be adjudged to be due process; but if found to be arbitrary, oppressive and unjust, it may be declared to be not due process of law."[22]

A horse may be seized or sold for taxes without trial; but an individual could not be seized without process, or condemned without trial. The two cases are different in

[21] Capital Trac. Co. v. Hof, 174 U. S. 1; Loving v. R. R. Co. 46 W. Va., 35 S. E. 962; Barlow v. Daniels, 25 W. Va. 512; Thompson v. Utah, 170 U. S. 343.

[22] Justice Bradly in Davidson v. N. Orleans, 96 U. S. 97; Wulzen v. Board, 40 Am. St. R. 17.

nature. Ordinary administrative procedure is due process.

Is Judicial Process Necessary to constitute due process? By no means in every case. If so, the wheels of government would stop. "Due process of law does not always require judicial hearing. It does in matters of purely judicial nature, but not in matters of taxation, or in matters purely administrative."[23]

"This court has heretofore decided that due process of law does not in all cases require a resort to a court of justice to assert the rights of the public against an individual, or to impose burdens on his property for public use. Hoboken v. Land Co., 18 How. 272, and McMillen v. Anderson, 95 U. S. 37."[24]

Necessarily many things can be done by state authority without a suit. Even an arrest by an officer in view of the commission of an offense can lawfully be made without a warrant, because it was authorized by common law before the amendment, and that does not abrogate this function; even the provisions in every constitution requiring for arrest a warrant upon cause shown do not impair this common law procedure.[25] Decisions of officers in first instance on facts are due process.[26]

"Any legal procedure enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislature, in furtherance of the

[23] State v. Sponaugle, 45 W. Va. 415, 32 S. E. 283, 43 L. R. A. 727.

[24] Davidson v. N. Orleans, 96 U. S. 97.

[25] Cox v. Gilmer, 88 Fed. 343; Miller v. Texas, 153 U. S. 535.

[26] Nishimura Ekin v. U. S. 142 U. S. 651.

general public good, must be held to be due process of law." [27]

"The Fourteenth Amendment does not undertake to control the power of a state to determine by what process legal rights may be asserted, or legal obligations be enforced, provided the method of procedure adopted gives reasonable notice and fair opportunity to be heard before the issues are decided." [28]

"Due process is not necessarily judicial. Administrative process, regarded as necessary in government, sanctioned by long usage, is as much due process as any other." [29]

"Undoubtedly where life and liberty are involved due process requires that there be a regular course of judicial proceeding, which implies that the party shall have notice and opportunity to be heard; so also where title or possession of property is involved." [30]

Abatement of Nuisance.—A proceeding in equity to abate a nuisance without a jury trial is due process, as chancery always exercised this jurisdiction.[31] A municipal corporation may summarily, without suit or warrant, remove a public nuisance by force, without jury trial or legal proceeding other than the order of its council, because it was a power wielded at common law by an

[27] Hurtado v. California, 110 U. S. 537; *In re* Debs, 158 U. S. 564.

[28] Iowa Central v. Iowa, 160 U. S. 389; L. & N. R. R. Co. v. Schmidt, 177 U. S. 230.

[29] Attorney v. Jochim, 99 Mich. 358, 41 Am. St. R. 606.

[30] Hagar v. Reclamation Dist. 111 U. S. 708.

[31] Kansas v. Zeibold, 123 U. S. 623; Ellenecker v. District, 134 U. S. 31; 20 Am. St. R. 556; State v. Saunders, 66 N. H. 39 (full).

individual even, to remove a public nuisance—it was due procedure by law before the Fourteenth Amendment. If actually necessary, the thing creating the nuisance may be destroyed or enjoined.[32]

Taxation.—*Taxes can be imposed and collected under state law, and, though property is seized and sold therefor without suit, it is due process,* and does not violate the amendment. In Witherspoon v. Duncan it is held that "the states, as a general rule, have the right of determining the manner of levying and collecting taxes on private property." [33]

"The power to impose taxes is one so unlimited in force, so searching in extent, that the courts scarcely venture to declare that it is subject to any restrictions whatever, except such as rest in the discretion of the authority which exercises it." [34]

To the states must be left this vast power for self-existence. "The basis of all taxation is political necessity. Without taxes there can be no revenue; without revenue there can be no government." [35]

Justice Field said, in "State Tax on Foreign-Held Bonds":[36] "It may touch property in every shape—in its natural condition, in its manufactured form, and in its varied transmutations. . . . It may touch business

[32] Lawton v. Steel, 152 U. S. 142; Hart v. Mayor, 24 Am. D. 165; Keeler Case, 55 Am. St. R. 785; Cook v. Harris, 61 N. Y. 448; City v. R. R. Co. 93 Fed. 119; Bank v. Sarlis, 28 Am. St. R. 185; Elliott, Roads & S. 486; 2 Wood, Nuis., Secs. 743, 744; Burlington v. Swartzman, 52 Am. R. 571.

[33] 4 Wall. 210.

[34] Cooley, Con. Lim. 587.

[35] Burroughs on Taxation, 1, 3.

[36] 15 Wall. 319.

in the almost infinite forms in which it is conducted—in professions, in commerce, in manufactures, in transportation. Unless restrained by provisions of the federal Constitution, the power of the state as to the mode, form and extent of taxation is unlimited."

Such general powers of taxation are, always were, inherent in every government, and when the Fourteenth Amendment came it found them vested in the states, and no claim can plausibly be made that these established, usual powers of taxation were impaired or narrowed by that amendment. It does not touch them. When Justice Field, as quoted above, spoke of limitations by the federal Constitution he must have referred to inhibitions upon the tax powers of the state by other clauses, such as imposts or duties on imports and exports, taxation of government bonds and other securities, not to any inhibition born of this amendment.

"The United States Constitution does not profess in all cases to protect against oppressive and unjust taxation by states." [37]

"This court can afford a citizen of a state no relief from enforcement of her laws prescribing the mode and subjects of taxation, if they neither trench upon federal authority nor violate any right secured or recognized by the Constitution of the United States." [38]

In Kelley v. Pittsburg[39] the claim was that the tax was contrary to the Fourteenth Amendment, but the court held that "although differing from proceedings in courts

[37] Memphis Gas Co. v. Shelby County, 109 U. S. 398.
[38] Kirtland v. Holkiss, 100 U. S. 491.
[39] 104 U. S. 78.

of justice, the general system of procedure for the levy and collection of taxes which is established in this country is, within the meaning of the Constitution, due process of law; and that a party is not deprived of his property without due process of law by the enforced collection of taxes merely because they, in individual cases, work hardship or impose unequal burdens."

In McMillen v. Anderson[40] it is held that the revenue laws of a state may be in harmony with the Fourteenth Amendment, though they do not provide that a person shall have opportunity to be present when a tax is assessed, or that it shall be collected by suit.

"Taxes are not, as a general rule, collected by judicial proceedings, and the procedure resorted to for their imposition and collection may be properly regarded as due process of law if it conforms to customary usage." [41]

Numerous cases hold this view.[42]

"Process of taxation does not require the same kind of notice as in a suit at law or proceedings under power of eminent domain. It involves no violation of due process of law when executed according to customary forms and established usage. . . This must be so, else the existence of government might be put in peril by delays attendant upon formal judicial proceedings for collection of taxes." [43]

[40] 95 U. S. 37.

[41] Wulzen v. Board, 40 Am. St. R. 1.

[42] Crandall v. Nevada, 6 Wall. 35; McCullough v. Maryland, 4 Wheat. 317; Fallbrook v. Bradley, 164 U. S. 113; Bank v. N. Y. City, 2 Black, 620.

[43] Bells Gap R. R. Co. v. Pennsylvania, 134 U. S. 232; Palmer v. McMahon, 133 U. S. 660.

"Of the different kinds of taxes states may impose there is a vast number of which, from their nature, no notice can be given the taxpayer; nor would notice be of any advantage to him; such as poll taxes, license taxes (not dependent on extent of business) and generally specific taxes on things, persons or occupations. In such cases the legislature, in authorizing the tax, fixes the amount, and that is the end of the matter. If the tax is not paid, property may be sold and the owner be thus deprived of it. Yet there can be no question that the proceeding is due process of law, as there is no inquiry into the weight of evidence or other element of judicial nature, and nothing could be changed by hearing the taxpayer. No right of his is thereby invaded. Thus, if the tax on animals be fixed at a sum per head, or on articles at so much per yard, bushel or gallon, there is nothing the taxpayer can do to affect the amount to be collected from him. So if a person wishes a license to do business of a particular kind, or at a particular place, such as keeping hotel or restaurant, or selling liquor, cigars or clothes, he has only to pay the amount required by law. There is no need in such case for notice or hearing. So, also, if taxes are imposed in the shape of licenses for privileges, such as those on foreign corporations for doing business in a state, or on domestic corporations for franchise, the parties have only to pay the amount. In such cases there is no need for notice or hearing, as the amount would not be changed. But where a tax is levied on property not specifically, but according to value, to be ascertained by assessors, upon such evidence as they may obtain, a different principle comes in. The officers in estimating

value act judicially; and in most of the states provision is made for the correction of errors committed by them, through boards of revision or equalization, sitting at designated periods provided by law to hear complaints respecting the justice of the assessment. The law in prescribing the time when such complaint will be heard gives all the notice required, and the proceeding by which the valuation is determined, though it may be followed, if the tax is not paid, by a sale of the delinquent's property, is due process of law." [44]

The failure to provide a hearing before the governor for revaluation of undervalued property under an act of the legislature does not make the proceeding void for want of due process, as the governor only starts the inquiry, and opportunity for hearing is offered in subsequent proceedings. Nor is it a denial of equal protection under the Fourteenth Amendment; and a revaluation of undervalued assessment, to make property bear the burden it would have borne by a fair assessment in the first instance, does not violate the call for due process on the theory that the first assessment was a judgment which could not be changed.[45]

As to hearing in proceedings of taxation, there need be no judicial inquiry, it being sufficient if an opportunity to question the vadidity or amount of the tax, either befor the amount of the tax is determined or in subsequent proceedings for collection, is given. I understand by this

[44] Hager v. Reclamation District, 111 U. S. 709; Palmer v. McMahon, 133 U. S. 661; Bells Gap Co. v. Pennsylvania, 134 U. S. 233; Pittsburg v. Backus, 154 U. S. 421; Kentucky Railroad Tax Cases, 115 U. S. 321; Spencer v. Merchant, 125 U. S. 345.

[45] Weyerhauser v. Minnesota, 176 U. S. 550, 20 Sup. Ct. R. 485.

that if the statute give any mode of correction it is enough. And as to validity, if equity gives relief, as it does, though the statute gives no mode of correction, the assessment is according to due process.[46] My understanding is that equity gives relief against unauthorized, illegal imposition of taxes; and so the existence of that remedy would exclude the idea that the imposition of the tax was without due process. As shown by the authorities cited by me in State v. Sponaugle[47] if there exists any right to contest a proceeding of taxation after its imposition, it is enough to prevent the charge that it is without due process of law.

Such laws in a state as have been the accustomed, ordinary, usual laws for the assessment and collection of taxes are due process of law under the Fourteenth Amendment. The authorities cited in State v. Sponaugle, last cited, will show this. In that case state law forfeiting land for failure to charge it on the land-tax books was held not repugnant to the Fourteenth Amendment, because such a law for the enforcement of taxes by forfeiture of the land had been frequently, through many years, resorted to in the two Virginias as a means of enforcing the payment of delinquent taxes. This state law was upheld as consistent with the Fourteenth Amendment by the United States Supreme Court.[48]

An act requiring commissioners to assess for taxation land before omitted, held not contrary to the Fourteenth Amendment as taking property without due process of

[46] Winona v. Minnesota, 159 U. S. 526.
[47] 45 W. Va. 415, 32 S. E. R. 283, 43 L. R. A. 727.
[48] King v. Mullins, 171 U. S. 404.

law, since the act allowed a taxpayer two years to ask relief for erroneous assessment.[49]

As will appear in cases above cited, the Virginia courts held valid acts of the legislature forfeiting land for omission to enter them on the tax-books, or to pay taxes actually assessed, and also held that such acts, *ex proprio vigore,* without any judicial proceeding, forfeited the owner's title and vested it in the state. When those Virginia decisions were made the Virginia constitution contained this demand of due process. This power of taxation is so great that the Virginia court has held that a man may be arrested and imprisoned under a mere license certificate of an assessor of the revenue on failure to pay tax on license as a distiller, without a violation of the Virginia Bill of Rights saying that no one shall "be deprived of his liberty except by the law of the land or the judgment of his peers."[50]

We repeat here that due process means the same under all the constitutions, state and federal, including the Fourteenth Amendment. To show that process usual for the collection of taxes is due process of law I may cite Murray v. Hoboken Land Company.[51] A distress warrant was issued against the property of a defaulting revenue collector, and under it land was sold, and it was claimed that it deprived him of his land without due process, contrary to Amendment V. The sale was held valid on the ground that the distress warrant was an authorized process for the collection of revenue. The court said:

[49] Douglas County v. Commonwealth, 34 S. E. 52; 97 Va. 397.
[50] Commonwealth v. Byrne, 20 Grat. 165.
[51] 18 Howard, 272. Also Fallbrook Irrigation Dist. v. Bradley, 164 U. S. 112.

"That the warrant now in question is *legal* process, is not denied. It was issued in conformity with an act of Congress. But is it *due* process of law? The Constitution contains no description of those processes, which it was intended to allow or forbid. It does not even declare what principles are intended to be applied to ascertain whether it be due process. It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative, as well as on the executive and judicial, powers of the government, and can not be so construed as to leave Congress free to make any process due process of law by its mere will. To what principles, then, are we to resort to ascertain whether this process enacted by Congress is due process? To this the answer must be twofold. We must examine the Constitution itself to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition, by having been acted on by them after the settlement of this country. We apprehend there has been no period since the establishment of the English monarchy when there has not been, by the law of the land, a summary method for the recovery of debts due to the crown, and especially those due from receivers of the revenues. It is difficult at this day to trace with precision all the proceedings had for these purposes in the earliest ages of the common law. That they were summary and severe, and had been used for purposes of

oppression, is inferable from the fact that one chapter of Magna Charta treats of their restraint. It declares, 'We, or our bailiffs, shall not seize any land or rent for any debt as long as the present goods and chattels of the debtor do suffice to pay the debt, and the debtor himself be ready to satisfy therefor.' By the common law the body, lands and goods of the king's debtor were liable to be levied on to obtain payment. In conformity with the above provisions of Magna Charta, a conditional writ was framed commanding the sheriff to enquire of the goods and chattels of the debtor, and if they were insufficient, then to extend on the land. But it is said that since the Statute 33, Hen. VIII, C. 39, the practice has been to issue the writ in an absolute form. . . . This brief sketch of the modes of proceeding to ascertain and enforce payment of balances due from receivers of the revenue in England is sufficient to show that the methods of ascertaining the existence and amount of such debts, and compelling payment, has varied widely from the usual course of the common law on other subjects, and that as respects such debts due from such officers, 'the law of the land' authorized the employment of auditors and an inquisition without notice, and a species of execution bearing close resemblance to what is termed a warrant of distress in the Act of 1820, now in question. It is certain that this diversity in the law of the land between public defaulters and ordinary debtors was understood in this country, and entered into the legislation of the colonies and provinces, and more especially of the states, after the Declaration of Independence and before the formation of the Constitution of the United States. Not only was the process

of distress in nearly or quite universal use for the collection of taxes, but what was termed a warrant of distress, issuing against the body, goods and chattels of defaulting receivers of public money, was issued to some public officer, to whom was committed the power to ascertain the amount of the default, and by such warrant to proceed to collect."

The court then specifies various states in which such revenue-collecting procedure was resorted to, and adds:

"This legislative construction of the Constitution, commencing so early in the government, when the first occasion for this manner of proceeding arose, continued throughout its existence, and repeatedly acted on by the judiciary and the executive, is entitled to no inconsiderable weight upon the question whether the proceeding adopted by it was due process of law. . . . Tested by the common and statute law of England prior to the emigration of our ancestors, and by the laws of many of the states at the time of the adoption of this amendment (Article V), the proceedings authorized by the Act of 1820 can not be denied to be due process of law when applied to the ascertainment and recovery of balances due the government from a collector of customs, unless there is in the Constitution some other provision which restrains Congress from authorizing such proceedings. For, though due process of law generally implies and includes *actor, reus, judex,* regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceedings (2 Inst. 47, 50; Hoke v. Henderson, 4 Dev. N. C. 15; Taylor v. Porter, 4 Hill, 140, 146; Van Zant v. Waddel, 2 Yerg. 260; State Bank v. Cooper, Id. 599;

Jones v. Perry, 10 Id. 59; Green v. Briggs, 1 Curtis C. C. R. 311), yet this is not universally true. There may be, and we have seen that there are cases under the law of England after Magna Charta, and as it was brought to this country and acted on here, in which process, in its nature final, issues against the body, lands and goods of certain public debtors without any such trial."

This case is largely commented upon in the Virginia Supreme Court, through President Moncure, and it is there shown, by cases from Tennessee, Kentucky, Maine, Massachusetts, Georgia, Missouri and other states, that summary proceedings, without judicial proceeding and without notice, have always been and are due process of law in the assessment and collection of taxes.[52]

A statute that land purchased for taxes by the state, if not redeemed within two years, any person may purchase of the state and take deed, and that such deed can only be defeated by proof that the taxes had been paid, held not contrary to the Fourteenth Amendment, but justified by the taxing power.[53]

But while this power of state taxation is thus large, it is proper to say, though it is not strictly pertinent to this work, that this "power of a state is limited to persons, property and business within its jurisdiction. All taxation must relate to one of these subjects." [54]

In the case just cited it was held that bonds of a rail-

[52] Commonwealth v. Byrne, 20 Grat. 165.

[53] Virginia Coal Co. v. Thomas, 97 Va. 527, 34 S. E. 486. See Castillo v. McConnico, 168 U. S. 682; King v. Mullins, 171 U. S. 404; Williams v. Supervisors, 122 U. S. 164; Multnomah v. Savings, 169 U. S. 421.

[54] State Tax on Foreign-Held Bonds, 15 Wall. 300.

road company held by non-residents of the state of incorporation could not be taxed by it.

No State Taxes on United States Securities.—A state can not tax bonds, treasury notes or other evidences of indebtedness of the national government, or any instrumentalities or agencies or property necessary in the performance of its appointed functions.[55] But it may levy inheritance tax on them. It is not a property tax.[56]

No State Tax on Federal Office or Salary.[57]

No Federal Tax on Salary of State Officer.[58]—Nor on bonds, or property or agencies of a state government or municipality.[59]

No State Tax on Exports or Imports to or from foreign countries while the goods are in original cases ready for export, or at the close of import, unbroken or unsold.[60]

No State Tax on Passengers or Freight Passing from State to State, nor on a railroad for them. This would interfere with interestate commerce, would restrict it unlawfully, in violation of that clause of the Constitution giving Congress power to regulate interstate commerce.[61]

For the same reason a state can not tax articles of freight taken up without the limits of a state and carried into it, or taken up in the state for carriage out of it.[62]

[55] Bank v. N. Y. City Bank, 2 Black, 620; Bank v. Mayor, 7 Wall. 16; Mitchell v. Commissioners, 91 U. S. 206; Telegraph Co. v. Texas, 105 U. S. 460; Van Brocklin v. Tennessee, 117 U. S. 151.

[56] Plummer v. Coler, 178 U. S. 115; U. S. v. Perkins, 163 U. S. 625.

[57] Dobbins v. Erie Co. 16 Peters, 435.

[58] Collector v. Day, 11 Wall. 113.

[59] Ward v. Maryland, 12 Wall. 427; R. R. v. Penniston, 18 Wall. 5; Pollock v. Farmers' L. & T. Co., 157 U. S. 429.

[60] Lowe v. Austin, 13 Wall. 29; Brown v. Maryland, 12 Wheat. 419.

[61] Crandall v. Nevada, 6 Wall. 35.

[62] State Freight Tax Case, 15 Wall. 232.

Thus it appears that the powers of each government, federal and state, are separate as to taxation. Each has full power of taxation; but one can not impair the governmental powers of the other by taxing its property, securities, agencies or means essential for purposes of government.

Taxation must be for Public Purposes.—It will appear from authorities above that the state power of taxation is very wide; but wide as this power is, still it is not utterly without limits; it can be exercised only for public ends. Taxation for any other purpose would take property without due process of law, contrary to the Fourteenth Amendment. "The general grant of legislative power in the constitution of a state does not authorize the legislature, in the exercise of either the right of eminent domain or of taxation, to take private property without the owner's consent for any but a public object. The legislature of Missouri has no constitutional power to authorize a city to issue bonds by way of donation to a private manufacturing corporation." [63]

"There is no such thing in the theory of our governments, state or national, as unlimited power. The executive, the legislative and the judicial departments are all of limited and defined powers. There are limitations of such powers which arise out of the essential nature of all free governments, implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name. Among these is the limitation of the

[63] Cole v. La Grange, 113 U. S. 1.

right of taxation, that it can only be used in aid of a public object, an object within the purpose for which governments are established. It can not be used in aid of a private enterprise."[64]

The last case cited holds, as many others do, that whether exactions from the people are lawful taxation is ultimately a judicial queston for the courts. Such exaction, not lawful taxation, would be a deprivation of property without due process, violative of state constitutions and the Fourteenth Amendment.[65]

Distress for Rent seizes and sells property without jury or trial; yet having been used as a legal process well known to the common law for the collection of rent for centuries before the amendment, it is due process, and not repugnant to that amendment.[66] Generally, the law allows a forthcoming or replevin bond to be given in cases of distress for rent, and defense thereto may be made on the ground of illegality or excess of distress, as stated in the case just cited, and this constitutes due process of law.

Death Sentence without Jury.—As the state constitutions require the criminal fact to be found by a jury, of course such sentence, or any sentence deprivative of liberty, without a jury, would be against the Fourteenth Amendment; but where one confesses the criminal fact in the open court upon arraignment, the court, without jury, may determine whether death or a lighter punishment shall be inflicted without violating the Fourteenth

[64] Loan Association v. Topeka, 20 Wall. 655.
[65] Cooley on Taxation, 67; Sharpless v. Mayor, 59 Am. Dec. 759.
[66] Anderson v. Henry, 45 W. Va. 319, 31 S. E. 998.

Amendment, provided the state law allows it. The state statute may, in such case, allow the accused to elect to be tried by the court.[67]

Punishment for Contempt.—Contempt of court, or of a legislative body, may be punished without a jury, and is due process, so far as the Fourteenth Amendment goes, as it was always an established procedure used by the courts and legislative bodies as essential for the efficient discharge of the functions belonging to them under the law. Prompt action in such cases is essential. Courts and legislative bodies must necessarily preserve their existence and efficacy of action by prompt punishment of obstruction or resistance to their proceedings.[68]

In the Eilenbecker Case cited one was summarily punished for selling liquor contrary to an injunction against so doing, and it was held that the state might call into requisition all the powers of courts, chancery or law, to suppress the manufacture and sale of liquor.

Entry upon Land for Survey for railroad or private person, where authorized by statute, does not violate the Fourteenth Amendment. It would be a trespass if done without the owner's consent; but the act of the legislature allowing it takes from the act the character of trespass, and as it does not take away the owner's property, and is no substantial injury, and does not substantially deprive him of its use, it does not violate the Constitution.[69]

[67] Hallinger v. Davis, 146 U. S. 314.

[68] Eilenbecker v. Dist. Court, 134 U. S. 31; *In re* Debs, 158 U. S. 564; Barclay v. Barclay, 184 Ill. 471; Kilbourn v. Thompson, 103 U. S. 168.

[69] Montana Co. v. St. Louis Co. 152 U. S. 160.

Condemnation of Land.—If property is condemned for public use without payment of, or security for, compensation, though in a regular proceeding in court otherwise proper, it is a taking of property without due process of law, contrary to the Fourteenth Amendment.[70]

Taking Property for mere Private Use.—Private property is sacred. It can not be taken from one man for the mere *private* use of another, even with full compensation. The purpose of its condemnation must be public, either for the use of the state or some of its counties or municipalities performing, in part, the functions of a state, or for the use of some corporation chartered by the state for the performance of functions deemed public, for transportation or other public benefit. Condemnation for such public purposes must be with compensation. If the condemnation is for any other than such public purpose, and is merely for the private use or convenience of another man, it is a gross violation of the Fourteenth Amendment, as also of the state constitutions. The state constitutions declare that private property shall not be taken, even for public use, without compensation, thus denying, by the strongest implication, the right to take it for private use even with compensation.[71] Hence, an act allowing taking of land for a private road is unconstitutional.[72]

Compensation for Land Condemned to public use under the power of eminent domain may be fixed, where state

[70] Chicago, B. & Q. Co. v. Chicago, 166 U. S. 226, 235; Norwood v. Baker, 172 U. S. 269.

[71] Missouri Pacif. Co. v. Nebraska, 164 U. S. 403.

[72] Varner v. Martin, 21 W. Va. 534; Holden v. Hardy, 169 U. S. 366.

statute allows, by commissioners, and due process of law under the Fourteenth Amendment does not require a jury.[73] State court may one time rule that compensation is to be fixed by jury before a sheriff, and another time by jury before judge, yet this is only a change of procedure, not against amendment.

Assessing Improvements on Lot-Owners.—Legislation allowing costs of paving and grading streets, making sewers, drains and the like by towns to be charged to lot-owners, and making it a lien on the lots, does not take property without due process, as it is justified under the taxing power.[74]

But the cited cases hold notice of the proposed assessment to be given the lot or land-owner necessary, else it is without due process. The case of Dewey v. Des Moines, cited in last footnote denies right to make a non-resident personally liable for such improvement.

The Virginia case of Heth v. Radford,[75] requires not only that notice shall be given, but that such notice must be provided for in the statute, else due process is wanting, and renders the proceeding void; but it occurred to me that this was an unreasonable requirement, and that the statute should be construed as contemplating notice, and requiring it, to make the proceeding good under the prin-

[73] Bauman v. Ross, 167 U. S. 548; Backus v. Fort Smith, 169 U. S. 557; Gilmer v. Hunnicutt, 35 S. E. 521.

[74] Walston v. Nevin, 128 U. S. 578; Paulsen v. Portland, 149 U. S. 30; Wurtz v. Hoagland, 114 U. S. 606; Bauman v. Ross, 167 U. S. 548; Davidson v. N. Orleans, 96 U. S. 97; Spencer v. Merchant, 125 U. S. 345; Dewey v. Des Moines, 173 U. S. 193; People v. Mayor, 55 Am. D. 266, full discussion and note; Hagar v. Reclamation Dist. 111 U. S. 701; Leighton v. Young, 52 F. 439; Loeb v. Trustees, 179 U. S. 472, 21 Sup. Ct. 174; King v. City, 63 Pac. 2.

[75] Heth v. Radford, 31 S. E. 8.

ciple prevalent in the construction of statutes, that, where a statute authorizes a proceeding operative to the prejudice of another, notice is intended and required of the proceeding to make it good; and I find that Poulsen v. Portland[76] says that the statute need not expressly provide for notice, but that notice must be given, though the statute does not in words require it. So holds the West Virginia court.[77]

It is held that charging property with improvements must have the basis of actual benefit to the property, else it can not be sustained. The legislature can not merely authorize such assessment without this element of benefit; and, indeed, the assessment beyond actual benefit is unconstitutional. I understand by this excessive damages are meant.[78] Merely charge by frontage will not do. It must be by value of improvement.

Public Office not Vested Property.—The Fourteenth Amendment does not protect it. Removal from it by such procedure as the state sees fit to adopt is due process in such case. No jury is required in such cases, unless the state statute provides for it.[79] A municipal corporation may remove its officers at pleasure, where it has power to appoint. Town v. Filler, 47 W. Va.—, 35 S. E. 6; Richard v. Clarksburg, 20 Am. and Eng. Corp. Cases, 111.

[76] 149 U. S. 30.

[77] B. & O. Co. v. P. W. K. Co. 17 W. Va. 813.

[78] Norwood v. Baker, 172 U. S. 269; Hutchinson v. Stovie, 92 Tex. 685, 71 Am. St. R. 884; Adams v. City, 154 Ind. 467. See Cass Farm v. Detroit, 83 N. W. 108, *contra*.

[79] Wilson v. North Carolina, 169 U. S. 586; Moore v. Strickling, 46 W. Va. 515, 33 S. E. 274; Atty. General v. Jochim, 99 Mich. 358, 41 Am. St. R. 606; *Ex parte* Wall, 107 U. S. 265; Talioferro v. Lee, 97 Ala. 92; Taylor v. Beckham, 178 U. S. 548. 20 Sup. Ct. 899. See Foster v. Kansas, 112 U. S. 201; Kennard v. Louisiana, 92 U. S. 480.

Tax Deed as Evidence.—A statute making a tax deed conclusive as evidence to divest the former owner of title and vest it in the tax-purchaser, or evidence of any step essential to pass title from the owner, takes property from that owner without due process of law. The statute may make such deed *prima facie,* but not conclusive, evidence.[80]

City Ordinance against Speeches in Street or park does not violate the amendment, as depriving a person of liberty without due process. It is justified by the police power, which is left with the states by the Fourteenth Amendment.[81]

City Ordinance against Street Obstruction is a valid exercise of police power consistent with the Fourteenth Amendment. A building can not be moved in body across a street, contrary to ordinance.[82]

[80] Castillo v. McConnico, 168 U. S. 674; McCready v. Sexton, 29 Ia. 356, 4 Am. R. 214; Dequasie v. Harris, 16 W. Va. 345; Williams v. Kirtland, 13 Wall. 306; Cooley, Taxation, 355.

[81] Davis v. Massachusetts, 167 U. S. 43.

[82] Wilson v. Eureka. 173 U. S. 32.

Chapter 12.

POLICE POWER OF STATES.

Those great powers vested in a state and its subordinate agencies, such as counties, cities, towns or townships, called the police power, under which life, liberty and property may be taken, existed from the dawn of government, existed in the Colonies at the date of the Declaration of Independence, and were always exercised by the states, notwithstanding clauses in their own constitutions declaring that no person should be deprived of life, liberty or property without due process of law, and the exericise of such powers by the states was always held to be entirely consistent with such constitutional provisions. These powers can not properly be called exceptions from the constitutional demand of due process of law; for they are, in themselves, due process, because they are proper, usual, ordinary action pursuant to law, and appropriate in the particular case. When the Fourteenth Amendment came, it came, not to destroy rights existing in the states; it did not undertake even to define due process of law, or to declare or indicate what already were, or should thereafter be, legitimate powers of the states; it used only the common law expression, "due

process of law," as a legal phrase of common law import, as a thing pre-existing. It neither originated, enlarged, nor narrowed that expression in its meaning. It simply declared that no state shall pass upon or affect the life, liberty or property of a person, except according to due process of law, whatever that be in the particular case or instance, tested by the existing general law applicable alike to all. Plainly, then, this amendment does not touch to impair the lawful police power of the states. It does not create, narrow or widen police power, but leaves it as it was before the amendment came.[1]

"The Fourteenth Amendment does not impair the police power of the states." [2]

Upon this subject Chief-Justice Fuller says: "The power of the state to impose restraints and burdens upon persons and property in conservation and promotion of the public health, good order and prosperity, is a power originally and always belonging to the states, not surrendered by them to the general government, nor directly restrained by the Constitution of the United States, and essentially exclusive. And this court has uniformly recognized state legislation, legitimately for police purposes, as not, in the sense of the Constitution, necessarily infringing upon any right which has been confided expressly or by implication to the national government. The Fourteenth Amendment, in forbidding a state to make or enforce any law abridging the privileges and immunities of citizens of the United States, or to deprive any per-

[1] Barbier v. Connolly, 113 U. S. 27; Minneapolis v. Beckwith, 129 Id. 26.

[2] Slaughter House Cases, 16 Wall. 36.

son of life, liberty or property without due process of law, or to deny any person within its jurisdiction the equal protection of the laws, did not invest, and did not attempt to invest, Congress with power to legislate upon subjects which are within the domain of state legislation." [3]

Chief-Justice Taney, in License Cases,[4] said of the police powers: "They are nothing more or less than powers of government inherent in every sovereignty. Whether a state passes a quarantine law, or a law to punish offenses, or establish courts, or to record instruments, or regulate commerce within its territory, in every such case it exercises the same power to govern men and things."

Indeed, this police power is so essential to state government that it has been held that it is not within the power of a state to grant it away to a corporation, or embargo itself from its future exercise, or otherwise relinquish or bargain it away.[5] A state could not be a government, could not give protection to its people in return for their allegiance and taxes did it not possess this police power; for upon it rests her entire criminal law, all law to protect life, limb, property, health, order, morals —all the highest behests and wants of organized society. The Supreme Court said: [6] "It is thoroughly established in this court that the inhibitions of the Constitution of the United States upon impairment of contracts or deprivation of property without due process of law, or equal

[3] *In re* Rahrer, 140 U. S. 554.

[4] 5 How. 583.

[5] Beer Co. v. Massachusetts, 97 U. S. 25; Stone v. Mississippi, 101 U. S. 814; Railroad Co. v. Transportation Co. 25 W. Va. 324.

[6] N. Y. & N. E. R. R. Co. v. Bristol, 151 U. S. 567.

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protection of law by the states, are not violated by the legitimate exercise of legislative power in securing public safety, health and morals. The governmental power of self-protection can not be contracted away, nor can the exercise of rights granted, nor the use of property, be withdrawn from the implied liability in particulars essential to the preservation of the community from injury," citing many cases.

"The police power is as broad and plenary as the taxing power (as defined in Coe v. Errol, 116 U. S. 517), and property within the state is subject to the operation of the former so long as it is within the regulating restrictions of the latter." [7]

"All rights are subject to the police power of a state; and if public safety or morals require the discontinuance of any manufacture or traffic, the legislature may provide for its discontinuance, notwithstanding an individual or corporation may suffer inconvenience." [8]

"The settled rule of this court is that the mere fact of pecuniary injury does not warrant the overthrow of legislation of a police character." [9]

Criminal Law Rests on Police Power.—There is no other warrant for it. Indeed, a large part of the civil law, that giving right of action for torts and contracts, rests on this police power. "Undoubtedly the authority to determine what crimes are punishable, and to provide for their punishment, is a part of the general police power of a sovereign and independent state, and, not being con-

[7] Kidd v. Peirson, 128 U. S. 1.
[8] Beer Co. v. Massachusetts, 97 U. S. 25.
[9] L'Hote v. New Orleans, 177 U. S. 587.

ferred by the Constitution of the United States upon the federal government, remains with the separate states of the Union." [10]

It is impossible and dangerous to lay down an iron-bound, inflexible definition of the police power. It is elastic, changing with time and need. "How far the police power goes must be left for decision in each case as it arises." [11]

Wide as is this power, everything and anything done under state authority can not be justified under it. The act done must fall within the legal bounds of the police power. If it exceeds those bounds, and prejudices life, liberty, property, equality before the law, or privilege or immunity, it justifies federal intervention under the Fourteenth Amendment, because it violates that amendment.[12]

"Under pretense of police regulation the state can not be permitted to encroach upon any of the just rights of the citizen, which the Constitution intended to secure against abridgement." [13]

Definition of Police Power.—Practically I have above given such definition. "Police power, in its broadest acceptation, means the general power of a government to preserve and promote public welfare, even at the expense of private right." [14]

[10] 1 McClain's Crim. Law, Sec. 23.

[11] Allgeyer v. Louisiana, 165 U. S. 578.

[12] State v. Goodwill, 33 W. Va. 179, 25 Am. St. R. 863, and note; Ruhstratt v. People, 185 Ill. 133; Frost v. Chicago, 178 Ill. 250, 49 L. R. A. 657; State v. Johnson, 61 Kan. 803, 49 L. R. A. 662.

[13] Field, J., in Slaughter House Cases, 16 Wall. 87.

[14] Cooley, Con. Lim. 707; Tiedman's Police Limitations, Sec. 1.

In Lawton v. Steele[15] is an opinion by Justice Brown which I consider one of the very best statements of the nature and extent of the police power to be found anywhere. He says: "It is universally conceded to include everything essential to public safety, health and morals, and to justify destruction or abatement by summary proceedings of whatever may be regarded as public nuisances. Under this power it has been held that the state may order the destruction of a house falling to decay or otherwise endangering the lives of passers-by; the demolition of such as are in the path of conflagration; the slaughter of diseased cattle; the destruction of decayed or unwholesome food; the prohibition of wooden buildings in cities; the regulations of railways and other means of public conveyance, and of interments in burial-grounds; the restriction of objectionable trades to localities; the compulsory vaccination of children; the confinement of the insane or those afflicted with contagious disease; the restraint of vagrants, beggars and habitual drunkards; the suppression of obscene publications and houses of ill fame; and the prohibition of gambling-houses and places where intoxicating liquors are sold. Beyond this, however, the state may interfere wherever the public interests demand it, and in this particular a large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests. To justify the state in thus interposing its authority in behalf of the public it must appear, first, that the

[15] 152 U. S. 133.

interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under guise of protecting public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination of what is a proper exercise of the police power is not final or conclusive, but is subject to the supervision of the courts."

The police power of a state is the power to prescribe laws and regulations for the good order, peace, protection, safety of person, character and property, comfort, convenience, morals of the community, and to accomplish these ends it may do anything not trenching on the like powers of the federal government.[16]

"It is the inherent and plenary power of the state which enables it to prohibit all things hurtful to the comfort and welfare of society."[17]

"As soon as any part of a person's conduct affects prejudicially the interests of others, society has jurisdiction over it."[18]

"It is within the general power of the state to promote the public welfare and health, even at the expense of private right, and this power may be delegated to private corporations. It rests solely with the legislative discre-

[16] N. O. Gas Co. v. Hart, 40 La. Ann. 474, 8 Am. St. R. 544, 20 Am. & Eng. Corp. Cas. 258; Western Union Co. v. Pendleton, 122 U. S. 359, 18 Am. & Eng. Corp. Cas. 18.

[17] Hale v. Lawrence, 1 Zabriskie, 714, 47 Am. D. 190.

[18] Mills on Liberty, Ch. 4.

tion, inside of constitutional limits, to determine when public safety and welfare require the exercise of the police power. Courts can interfere only when such exercise conflicts with the Constitution; with the wisdom, policy or necessity of such exercise they have nothing to do." [19]

In the case just cited, and such is certainly law, it is said that a municipal corporation can not treat as a nuisance a thing that can not be such; but when from its nature or surroundings it does or may become such, the corporation may so treat it; and in doubtful cases depending on a variety of circumstances, which require the exercise of discretion, the decision of municipal authorities is conclusive and binding on the courts. But the action of the municipal council declaring a thing a nuisance is judicial in nature and subject to review by the courts.[20]

"All property, all business, every private interest may be affected by it and brought within its influence. Under it the legislature regulates the use of property, prescribes rules of personal conduct, and in numberless ways, through its pervading and ever-present authority, supervises and controls the affairs of men in their relation to each other and to the community at large, to secure the mutual and equal rights of all, and promote the interest of society. It has limitations; it can not be arbitrarily exercised to deprive the citizen of his liberty or his property. But a statute does not work such a deprivation in the constitutional sense simply because it imposes

[19] Walker v. Jameson, 140 Ind. 591, 49 Am. St. R. 222.

[20] Town of Davis v. Davis, 40 W. Va. 464; Cole v. Kegler, 64 Ia. 59, 19 N. W. 843; Teass v. City, 38 W. Va. 1.

burdens or abridges freedom of action, or regulates occupations, or subjects individuals or property to restraints in matters in difference, except as they affect public interests or the rights of others. Legislation under the police power infringes the constitutional guaranty only when it is extended to subjects not within its scope and purview, as that power was defined and understood when the Constitution was adopted. The generality of terms employed by jurists and publicists in defining the power, while they show its breadth and the universality of its presence, nevertheless leave its boundaries and limitations indefinite, and impose upon the court the necessity, as each case arises, to determine whether the particular statute falls within or outside of its appropriate limits." [21]

To the same effect is State v. Moore.[22] I think the above definition sound. It has been criticised[23] as endangering the irretrievable loss of the Fourteenth Amendment "in the illimitable or indescribable bounds of the police power"; but I am unable to see how that amendment wrought the slightest change in the police power of the state. It surely was not designed to take from the states the wonted necessary powers of government till then inherent in their sovereignty for governmental purposes. It created nothing new, defined nothing; simply required that state action be governed by due process of law; and acts legitimately within the police power are clearly due process. The sole question in each case is, Is this act one in its nature and character an act of

[21] People v. Budd, 117 N. Y. 1, 15 Am. St. R. 460.
[22] 104 N. C. 714, 17 Am. St. R. 696.
[23] Note, 25 Am. St. R. 883.

police? If so, the Fourteenth Amendment does not affect it. If it does, the state is virtually expunged as a government.

The case of Railroad Company v. Husen[24] admits this wide power in the states, and says that under it "the state may protect the lives, limbs, health, comfort and quiet of all persons and their property," according to the maxim, *sic utere tuo ut non alienum laedas,* which, being of universal application, must be within the range of legislative action to define the mode and manner in which everyone may so use his own as not to injure others; that under the police power persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health and prosperity of the state; of the perfect right to do which no question ever was, or upon acknowledged principles ever can be, made, so far as natural persons are concerned. It may also be admitted that the police power of a state justifies the adoption of precautionary measures against social evils. Under it a state may legislate to prevent the spread of crime, pauperism or disturbance of the peace. It may exclude from its limits convicts, paupers, idiots and lunatics and persons likely to become a public charge, as well as persons affected with contagious disease, a right founded, as said in the Passenger Cases, 7 How. 283, in the sacred law of self-defense. The same principle would justify the exclusion of animals having contagious or infectious diseases."

[24] 95 U. S. 465. See Austin v. Tennessee, 179 U. S. 343.

Notwithstanding all this, the court held in the case just cited that a statute prohibiting Texas, Mexican or Indian cattle from entering the State of Missouri for a period of three years, except in cars and boats not to be unloaded in the state, was void. On principles conceded by the court it is somewhat difficult to concur in this decision, except on the ground that the act was more than a quarantine regulation, and was not a legitimate exercise of the police power, as it prohibited entry of the cattle into the state absolutely, whether diseased or not, without inspection to ascertain the fact. The case denies absolute power in the legislature to judge whether the necessity of the police regulation exists. The case is probably decided rightly; but it goes very far to trench upon the police power of the state. Note, however, that it was not held that the Missouri act was forbidden by Amendment Fourteen, but that it was contrary to the commerce clause. The court admitted that even that clause, giving Congress power, as an affirmative grant of original jurisdiction, to pass laws covering the whole field of interstate commerce, does not forbid the exercise of police power in a proper case.

Commerce Clause.—The power to regulate commerce between the states is conferred on the Congress by the original Constitution, not by the Fourteenth Amendment, as the latter has no relation to it. This grant is not merely prohibitive, supervisory or corrective, but is an original affirmative grant of power, excluding power of the states on that subject; and whenever Congress makes a regulation touching it, state regulation must yield. Until Congress does make a regulation the state may enact

police laws touching interstate commerce.[25] Indeed, it is not easy to see why the state may not make what is a proper police regulation, one really within the police power, as to prevent contagion, pestilence or any dire public disaster, though it impair interstate commerce, and this seems granted in Railroad v. Husen;[26] still some decisions go to the effect that the powers of Congress are here entirely paramount, the grant of power exclusive, and that any regulation, even police, interfering with interstate commerce is void, not under the Fourteenth Amendment, but under Article 1, Section 8.[27]

The Illinois court held that an act prohibiting anyone from bringing into the state or owning Texas or Cherokee cattle was a valid exercise of the police power, and that as the act was properly such, it did not raise the question of constitutionality under the commerce clause.[28] I would think so. It can not be supposed that the states, in adopting the Constitution, gave up to any extent this function so essential to their very existence and health and well-being.

Police Power can not be Granted Away.—A strong argument for the position just stated is that it seems settled that a state can not effectually grant or contract away, or in anywise relinquish, its police power.[29] Certainly

[25] Lake Shore v. Ohio, 173 U. S. 285, 297.

[26] 95 U. S. 465. Full discussion, Austin v. Tennessee, 179 U. S. 343.

[27] Mobile v. Kimball, 102 U. S. 691, 697.

[28] Yeazel v. Alexander, 58 Ill. 254.

[29] N. Y. Co. v. Bristol, 151 U. S. 567; Chicago & c. v. Chicago, 166 U. S. 266. See also Beer Co. v. Massachusetts, 97 U. S. 25; Commonwealth v. Douglass, 100 Ky. 116, 66 Am. St. R. 328; People v. Squires, 1 Am. St. R. 893; 3 Ell. R. R., Sec. 1082, N. 5; Newburyport Co. v. City, 103 Fed. 584.

it is there asserted that the provisions prohibiting states from impairing the obligation of contracts, and from depriving of life, liberty and property without due process of law are subject to this police power.

State Control of Property and Title.—"The several states possess power to regulate tenure of real property within their respective limits, the modes of its acquisition and transfer, the rules of descent, and the extent to which a testamentary disposition of it may be exercised by its owner." [30] This is under the police power.

Is Police Power Confined to States?—The general rule is stated to be that the police power belongs to the states, not to the nation, except as to the District of Columbia and the territories.[31] Does this mean that the nation has no police powers at all? If so, I doubt its correctness. When the states granted the Union its powers, they granted police power to suit those functions. The nation prescribes penalties for offenses against the mails and the pension laws, counterfeiting national notes and coins, and for many other criminal and penal acts. I do not see how it can be said that as to functions committed to its charge, but not further, the nation has no police power.

Act Making Railroad Liable to Passengers for injuries, regardless of negligence on the part of the railroad, or passengers, is a valid exercise of police power, and does not violate the Fourteenth Amendment in depriving the railroads of property without due process of law, and does not deny them the equal protection of the laws.[32]

[30] U. S. v. Fox, 94 U. S. 315; Arndt v. Griggs, 134 U. S. 316; Clarke v. Clarke, 178 U. S. 186; Abraham v. Casey, 179 U. S. 210.

[31] U. S. v. De Witt, 9 Wall, 41.

[32] Clark v. Russell, C. C. A. 97 Fed. 900.

Act Making Railroad Liable for Fire from locomotives absolutely has been held valid, and consistent with the Fourteenth Amendment, because justified by the state's police power.[33]

Act Making Railroad Liable to Servants for negligence of fellow servants held valid under the Fourteenth Amendment, and due process, and does not deny equal protection of the law.[34]

Act Compelling Corporations to Pay Wages Every Month held valid as due process, and not a denial of the equal protection of the laws.[35]

Act Requiring Railroads to Pay Railroad Commissioners. The South Carolina act, requiring salaries and expenses of a state railroad commission of regulation to be borne by the railroad companies has been held to be not in conflict with the Fourteenth Amendment, either as depriving the corporations of property without due process, or denying them the equal protection of the laws.[36] In the first case cited the court said that the commission was designed to render railroads safe and efficient as common carriers, to protect life, to redress evils committed by corporations holding special franchises from the state and performing, not merely private functions and business, but public functions and business in touch with public interest, thus bringing them under the state power of

[33] Railway Co. v. Mathews, 165 U. S. 1; same v. same, 174 U. S. 96.

[34] Railroad v. Mackey, 127 U. S. 205; Tullis v. Lake Erie, 175 U. S. 348, 20 Sup. Ct. R. 136.

[35] Skinner v. Garrett, 96 Fed. 735.

[36] Charlotte, etc., Co. v. Gibbes, 142 U. S. 386; People v. Budd, 145 U. S. 175.

police regulation *pro bono publico;* so that it could not be charged that there was a deprivation of property without due process; and that, as the act applied to all railroads alike, it did not deprive them of equal protection of the law.

Railroad Rates.—Can a State Regulate Charges by railroads and other agencies of public business consistently with the Fourteenth Amendment? To make such regulations is clearly in nature an act of police. Even where charters have impaired this power of police in the state, as by licensing a lottery for a consideration paid for its incorporation, and the grant of its privileges, it has been held that "all agree that the legislature can not bargain away the police power of the state. Irrevocable grants of property and franchises may be made, if they do not impair the supreme authority to make laws for the right government of the state; but no legislature can curtail the power of it successors to make such laws as they may deem proper in matters of police." It was held that the state could annul the charter of the lottery.[37]

There is a great difference, under the head now being considered, between a private individual or a private corporation using his property in carrying on a purely private business, and a person or corporation carrying on a public business, that is, one concerning and affecting the public. The powers of police are in the latter case much wider than in the former case. This police power in government to regulate and control in charges and other

[37] Stone v. Mississippi, 101 U. S. 814; Douglass v. Kentucky, 168 U. S. 488; Commonwealth v. Douglass, 100 Ky. 29, 66 Am. St. R. 324, n. p. 333; Newburyport Co. v. City, 103 Fed. 584; Lake S. & M. S. Ry. Co. v. Smith, 173 U. S. 684.

respects in the latter case is very ancient, born of old common law, brought over the Atlantic by our forefathers, and fully established and inherent in the states prior to the Fourteenth Amendment. Lord Hale, more than two hundred years ago, said that when private property was "affected with a public interest, it ceases to be *juris privati* only." See his treatise, *De Portibus Maris,* 1 Hargrave's Law Tracts, 78. In his treatise, *De Jure Maris,* 1 Hargrave's Law Tracts, 6, Lord Hale said: "He [a private person] may make a ferry for his own use, but not for the common use of all the king's subjects passing that way; because it doth in consequence tend to a common charge, and it becomes a thing of public interest and use, and every man for his passage pays a toll, which is a common charge, and every ferry ought to be under a public regulation, viz., that it give attendance at due times, keep a boat in good order, and make but reasonable toll, for if he fail in these he is finable." In *De Portibus Maris,* 1 Hargrave's Law Tracts, 78, Lord Hale further says: "A man, for his own private advantage, may, in a port or town, set up a wharf or crane, and take what rates he and his customers can agree for cranage, wharfage, houselage, peasage; for he doth no more than is lawful for any man to do, viz., makes the most of his own. . . . If the subject have a public wharf into which all persons who come to that port must come and unload, or load their goods, because there is no other wharf in that port; in that case there can not be taken arbitrary and excessive duties for cranage, wharfage, peasage, etc., neither can they be enhanced to an immoderate rate; but the duties must be reasonable

and moderate, though settled by the king's license or charter. For now the wharf and crane and other conveniences are affected with a public interest, and they cease to be *juris privati* only; as if a man set out a street near a building on his own land, it is no longer bare private interest." This old law makes the true test on which modern decisions proceed. Is the business one purely private, or is it in touch with the public weal and interest? This doctrine was approved by Lord Kenyon.[38]

Lord Ellinborough held the same.[39]

These principles have been followed in America. The Alabama court[40] was called upon to say whether a power granted the city of Mobile to regulate the weight and price of bread was valid, and it was contended that it interfered with the right of the citizen to follow his lawful trade in the mode his judgment might dictate; but the court said: "There is no motive . . . for this interference on the part of the legislature with the lawful action of individuals, or the mode in which private property should be enjoyed, unless such calling affects the public interest, or private property is employed in a manner which directly affects the body of the people. Upon this principle, in this state, tavern-keepers are licensed . . . and the county court is required at least once a year to settle the rates of inn-keepers. Upon the same principle is founded the control which the legislature has always exercised in the establishment and regulation of mills, ferries, turnpikes, roads and other kindred subjects."

[38] Bolt v. Stennett, 8 L. R. 606.

[39] 12 East, 537.

[40] Mobile v. Yuelle, 3 Ala. N. S. 140. See Inter-Ocean Pub. Co. v. Asso. Press, 184 Ill. 438, 48 L. R. A. 568; People v. W. U. Tel. Co. 166 Ill. 15, 36 L. R. A. 637, 46 N. E. 731.

On principles stated in several places in this work the Fourteenth Amendment did not come to destroy the existing fabric of government, or to innovate upon and derange it, but to defend rights existing according to the established order of things, and did not abrogate this healthful power of the state to fairly and reasonably, for the public good, prevent extortion and abuse of franchise, and to supervise and control persons or corporations carrying on business deeply concerning the public, or business done under public grant of license, permit or corporate franchise intimately and widely affecting public weal.

In Railroad v. Transportation Company[41] this grave subject is fully discussed with signal ability and research by the great Judge Green, and the court held that railroad companies are common carriers in public business affecting public interests, and subject to legislative control as to rates of fare and freight, just as a natural person who is a common carrier is; that the company devotes its property to public use, and thus grants the public an interest in that property, we may say, and to the extent such interest goes, the company must submit to public control for the public good; that there is a marked difference between such corporations and purely private corporations. The former may be called quasi-public corporations, and the legislature has over their employment of property, so devoted to a use in which the public has an interest, a control which it would not have over the employment of property of a purely private corporation.

[41] 25 W. Va. 324.

The legislature can generally exercise no control forbidden by the charter of a purely private corporation. Though a railroad corporation is by a charter given "power to contract in reference to its business as private individuals," or to demand such rates for transportation and storage as it deems reasonable, or, though its charter fixes rates for it, and declares that they shall not be reduced by the legislature, and though no right to repeal or alter the charter be reserved in the act granting the charter, still the legislature has right subsequently to establish, "by general act," maximum rates and make it applicable to railroads already operating under previous charter.

The said case further holds that "irrevocable grants of franchises to corporations, which impair the supreme authority of the state to make laws for the right government of the state, must be regarded as mere licenses, not contracts which bind future legislatures; for no legislature can sell or give away the discretion of subsequent legislatures in respect to matters the government of which must, from the very nature of things, vary in varying circumstances." The case declares very broadly the inherent power of the legislature on the subject. I can safely refer to that opinion as a lucid and sound analysis of the subject, discussing its various phases. That case largely followed the leading case of Munn v. Illinois[42] and the several cases called "The Granger Cases".[43] In the Munn Case the holding is:

[42] 94 U. S. (4 Otto) 113.

[43] Chicago v. Iowa, and Peik v. Chicago Co. 94 U. S. (4 Otto.) 155 to 187.

"Under the powers inherent in every sovereignty, a government may regulate the conduct of its citizens toward each other, and, when necessary for the public good, the manner in which each shall use his own property. In the exercise of these powers it has been customary in England from time immemorial, and in this country from its colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, inn-keepers, etc., and in so doing to fix a maximum of charges to be made for services rendered, accommodations furnished and articles sold. Down to the time of the adoption of the Fourteenth Amendment to the Constitution of the United States it was not supposed that statutes regulating the use, or even the price of the use, of private property necessarily deprived the owner of his property without due process of law. Under some circumstances they may, but not all. The amendment does not change the law in this particular. It simply prevents the state from doing that which will operate as such deprivation. When an owner of property devotes it to a use in which the public has an interest, he in effect grants to the public an interest in such use, and must, to the extent of that interest, submit to be controlled by the public, for the common good, as long as he maintains that use. He may withdraw his grant by discontinuing such use. Rights of property and, to a reasonable extent, compensation for its use, created by common law, can not be taken away without due process; but the law itself, as a rule of conduct, may, unless constitutional limitations forbid, be changed at the will of the legislature. The great office of statutes is to remedy defects in the common law as developed, and

to adapt it to the change of time and circumstances. The limitation by legislative enactment of the rate of charge for services rendered in a public employment, or for the use of property in which the public has an interest, establishes no new *principle* in the law, but only gives effect to an old one. Where warehouses are situated and their business is carried on within a state exclusively, she may, as a matter of domestic concern, prescribe regulations for them, notwithstanding they are used as instruments by those engaged in interstate, as well as in state, commerce; and until Congress acts in reference to their interstate relations, such regulations can be enforced, even though they may indirectly operate upon commerce beyond her immediate jurisdiction."

The court held an act of Illinois providing for inspection of warehouses for storage of grain, and making regulation as to their business, and fixing maximum charges for storing and handling grain, valid under the Fourteenth Amendment, and as not depriving of liberty and property without due process of law. In Chicago, etc., Co. v. Iowa[44] it was held that "railroad companies are common carriers for hire. Engaged in public employment affecting the public interest, they are, unless protected by charter, subject to legislative control as to rates of fare and freight. The Burlington and Missouri Railroad Company has, within the scope of authority conferred by its charter, and subject to the limitation thereby imposed, the power of a natural person to contract in reference to its business. Like such person it, or its assignee, is, under

[44] 94 U. S. 155.

the same circumstances, at all times subject to such laws as the general assembly of the state may from time to time enact."

It held the act fixing railroad rates valid, though the charter gave the company right to fix rates.

In the case of Peik v. Chicago, etc., Company[45] the court held valid acts fixing charges, deciding that "where property has been clothed with a public interest the legislature may fix that which shall in law be reasonable for its use."

In Georgia Banking Company v. Smith[46] it is decided that the grant by a state to a railroad company of a franchise giving it special privilege to condemn land, and the obligation assumed by it to carry at reasonable rates, affect it with public use, and gave the state legislative control, which may extend to fixing rates. These doctrines have been often asserted by the Supreme Court.[47]

A railroad corporation must serve all alike. It can give no preference as to serving in the line of its business. It can not carry for one and refuse another. It may be compelled to perform proper and equal service for all by mandamus, and it is not thus deprived of property without due process of law or denied equality before the law.[48] So must other corporations.[49]

But while these and other cases clearly and properly give the state power by its legislature, notwithstanding

[45] 94 U. S. 164.

[46] 128 U. S. 174.

[47] Dow v. Biedelman, 125 U. S. 680; R. R. Commission Cases, 116 U. S. 307; Wabash Co. v. Illinois, 118 U. S. 557, 569; Chicago Co. v. Wilman, 143 U. S. 339, 344.

[48] State v. Pacif. Co. 52 La. Ann. 28 So. 284.

[49] Inter-Ocean Pub. Co. v. Asso. Press, 184 Ill. 438, 48 L. R. A. 568.

the Fourteenth Amendment, to regulate, control and fix charges for railroads or other corporations carrying on business touching the general public, the power can not be exercised tyrannically, oppressively, arbitrarily; it must be exercised purely for the public good, and that in a manner not destructive of the adverse interest; for, as elsewhere stated, great as is the police power of a state, everything done under its name can not be justified, but must be a legitimate, necessary act of police, and must pass under judicial review. The cases above cited have been construed by some as giving the legislature unlimited power to fix rates, and that only it, not the courts, had right to say what rates are reasonable, and that the legislative judgment was final. It is said that the later decisions have seriously qualified Munn v. Illinois, and impaired the right of the states to protect the public against wrong and extortion by railroad and other corporations.[49] It is not, can not be, claimed that the power to regulate and fix rates has been withdrawn by later decisions; but it is said that they do modify Munn v. Illinois in the point of the finality of the judgment of the legislature as to what are reasonable rates, the Munn Case and others above cited making the legislative action final and conclusive. The case is capable of such construction, but does not in words say so. That was not the question before the court. If such can be given as the true construction of those cases, later cases have modified them. The case of St. L. & San Francisco Co. v. Gill[50] holds that an act of railroad tariff rates so unreasonably low as to practi-

[49] Note, 62 Am. St. R. 289.
[50] 156 U. S. 649.

cally destroy the value of the property may be held by the courts as a judicial question, and adjudged contrary to the federal Constitution, because depriving the railroad company of property without due process of law. In another case[51] an act fixing rates so low as to deny a reasonable profit on the railroad investment was held violative of the Fourteenth Amendment in depriving the company of property without due process of law, and in denying it equal protection of the law.

It was held that the power to fix reasonable rates undoubtedly existed in the states; but that the claim that any legislature, state or federal, "can conclusively determine for the people and the courts that what it may enact in the form of law, or what it authorizes its agents to do, is consistent with fundamental law, is in opposition to our institutions, as the duty rests on all courts, federal and state, when their jurisdiction is properly invoked, to see to it that no right secured by the supreme law of the land is impaired or destroyed by legislation. The reasonableness or unreasonableness of rates prescribed by a state for the transportation of persons or property wholly within its limits must be determined without reference to the interstate business done by it or the profits from that business. The state can not justify unreasonably low rates for domestic transportation, considered alone, upon the ground that the carrier is earning large profits on its interstate business, over which, so far as rates are concerned, the state has no control; nor can the carrier justify unreasonably high rates on domestic business on

[51] Smith v. Ames, 169 U. S. 466; So. Western Union Co. v. Wyatt, 98 Fed. 335.

the ground that it may be able only in that way to meet losses on its interstate business. A railroad is a public highway, none the less so because constructed and maintained through the agency of a corporation deriving its existence and powers from the state. Such a corporation was created for a public purpose. It performs functions of the state. Its authority to exercise the right of eminent domain and charge tolls was given primarily for the benefit of the public. It is, therefore, under governmental control—subject, of course, to constitutional guaranties for protection of its property. It may not fix rates with a view solely to its own interest, and ignore the rights of the public; but the right of the public would be ignored if rates were exacted without reference to the fair value of the property used for the public or of the services rendered, in order simply that the corporation may meet operating expenses, pay interest on its obligations, and declare a dividend to stockholders. If a railroad corporation has bonded its property for an amount exceeding its value, or if its capitalization is largely fictitious, it can not impose upon the public the burden of such increased rates as may be required to realize profits on such excessive valuation or fictitious capitalization; and the apparent value of the property and franchises used by the corporation, as represented by its stock, bonds and obligations, is not alone to be considered when determining reasonable rates. The basis of all calculations must be the fair value of the property used by it for the convenience of the public; and to ascertain the value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of the bonds

and stock, the present as compared with the original cost of construction, the probable earning capacity under the particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters of consideration and given such weight as may be just and right in the case. What the company is entitled to ask is a fair return on the value of that which it employs for the public convenience; and what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth."

This denial of power in the state to deny rates which will give a fair return on the investment is asserted in other cases.[52]

Can there be Exemption from Rate Regulations?—This sovereign right of a state by police power to regulate, control and fix charges on railroads and other agencies can not likely be relinquished in charters.[53] But in another case it is assumed that the right of the state may be thus restrained;[54] and in still another case[55] it is held that if the exemption from legislative regulation as to rates is clear and explicit in the charter, and inconsistent with any power reserved by the state to that effect, it is a valid exemption. The author would humbly suggest that it is a very grave holding, one detrimental to the highest public interests, one which may in process of years be dis-

[52] Railway Co. v. Minnesota, 134 U. S. 418; San Diego Water Works v. City, 118 Cal. 556, 62 Am. St. R. 261.

[53] Ruggles v. Illinois, 108 U. S. 526, 542; Chicago, etc., Co. v. Minn. 134 U. S. 418.

[54] Chicago, etc., Co. v. Iowa, 94 U. S. 155.

[55] Georgia Bank v. Smith, 128 U. S. 174.

astrous to the public welfare, to say that a government can thus barter away its highest powers of sovereignty, can tie its hands forever from legislation necessary for the public good ; that one legislature may forever put a rein on the otherwise legitimate power of all succeeding legislatures. The West Virginia case of Railroad Company v. Transportation Company,[56] a well-considered one, holds principles as to this point, different from the cases just cited from the Supreme Court.

The doctrine of Munn v. Illinois, so far as it goes to say that the power of the state to regulate rates is consistent with the Fourteenth Amendment, has been uniformly followed and insisted upon in many subsequent decisions in the U. S. Supreme Court and in state courts. In one case[57] it was held to apply to an act of the legislature fixing rates for elevating, receiving and discharging grain at an elevator owned by private individuals, as in the Munn Case, because the private property was devoted to a business in which the public had an interest.

Waterworks.—In Spring Valley Waterworks v. Schlotler[58] it was held that a town might fix water rates for a waterworks company, when not forbidden by constitutional limitations or contract obligation. The charter allowed the corporation to take part in the choice of a board of commissioners to fix rates, and the constitution and law were amended so as to deprive the corporation of this right. Held not to violate the Constitution of the United States.

[56] 25 W. Va. 324; Newburyport Water Co. v. City, 103 Fed. 584.

[57] Budd v. New York, 143 U. S. 517. See also Brass v. Stoeser, 153 U. S. 391. Janvrin, petitioner, 174 Mass. 514.

[58] 110 U. S. 347; see Janvrin Case, 174 Mass. 514; see Los Angeles v. Los Angeles Co., 177 U. S. 558; Freeport Co. v. City, 186 Ill. 179.

In Chicago Company v. Minnesota[59] an act establishing a railroad and warehouse commission, and making the rates of transportation fixed by it final and conclusive, was, because of that conclusive feature, held repugnant to the Fourteenth Amendment as depriving the company of property without due process of law and denying it equal protection of the law. A later case so holds.[60] But another case[61] holds that the case of Chicago Company v. Minnesota, *supra,* does not antagonize or qualify Munn v. Illinois (94 U. S. 113).

In a later case[62] an act required railroad thousand-mile tickets to be sold at a fixed rate, and to be good to the purchaser and wife and children, valid for two years, and to be redeemed, so for as unused, within thirty days after the two years. The act was held void under the Fourteenth Amendment as taking property without due process and denying equal protection of the law, the court saying that while the state had right by general and equal law to fix maximum rates, this was an act applicable only to wholesale purchasers at lower rates, leaving other people liable to the usual higher rate fixed by the general law, interfering with the management of the affairs of the company by fixing the running time of tickets at double the former period and lower rates, and making the tickets good to all the members of the family. It was adjudged to be not a reasonable exercise of the police power. Still, the court is careful to say that the

[59] 134 U. S. 418.
[60] Regan v. Farmers Loan, 154 U. S. 362.
[61] Budd v. New York, 143 U. S. 517.
[62] Lake Shore v. Smith, 173 U. S. 684.

act which it passed upon was exceptional in character owing to its peculiar features, and the court further said that it was not intended to interfere with the power of the legislature over railroads as corporations or common carriers, "to so legislate as to fix maximum rates to prevent extortion or undue charges, and to promote safety, health, convenience or proper protection of the public; but it only says that the particular legislation under review in the case does not partake of the character of legislation fairly or reasonably necessary to attain any of those objects, and that it violates the federal Constitution as above stated."

The Court of Appeals of New York in Beardly v. N. Y. L. E. & W. Company,[63] held a similar act void, saying that it yielded to the power of the federal Supreme Court as expressed in the case of Lake Shore v. Smith, just above cited.

Rate Regulation must not Destroy Company Control.— The power above stated of a state legislature to regulate rates of transportation and the like can not carry with it the right to invade the lawful power of the company to manage, conduct and control its own business, to hamper or restrict its general control of its property in the transaction of its legitimate business. The said power of regulation includes only powers reasonably necessary and calculated to promote public welfare in furthering the objects above specified. Whenever, forgetful of these high public, impartial behests, the legislature acts out of mere prejudice against a corporation, ignoring all idea

[63] 56 N. E. R. 488; 162 N. Y. 230.

that it has any rights which the legislature is bound to respect, it is not constitutionally exercising salutary police powers, but only unfair, arbitrary power.

Power to Regulate, not Power to Destroy.—The cases above cited, as also Railroad Commission Cases,[64] declare that this power to regulate is not power to destroy. They hold that power in a state to limit the amount of railroad charges can not be granted away by its legislature, except by positive words, or their equivalent, in the grant; that a grant to a company from "time to time to fix, regulate and receive tolls and charges," does not deprive the state of power, within the limits of its general authority, as controlled by the federal Constitution, to act on the reasonableness of tolls so fixed; but from what has been said it is not to be inferred that this power of limitation or regulation is itself without limit. This power to *regulate* is not a power to *destroy*, and *limitation* is not the equivalent of *confiscation*. Under pretence of regulating fares and freights the state can not require a railroad corporation to carry persons and property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation or without due process of law. This doctrine is held also in Reagan v. Farmers Loan.[65]

What are Reasonable Rates?—This question is largely at sea. It would seem that the power of the state to fix rates being once conceded, its action by its legislature on mere amount ought to be conclusive, the legislative judgment seeming to be as good as that of judges on such a

[64] 116 U. S. 307.
[65] 154 U. S. 399.

subject. The nature of the function is purely legislative. The Supreme Court admits that no court can fix the rates, though it can overthrow those fixed by the state legislature. It seems to me that there is an inconsistency here. With great deference I would think that the question of *amount* of rates is solely for the legislature, not for the courts, as is strongly stated by Justice Bradley for himself and Justices Brewer and Lamar in the case cited in the footnote.[66] But it is said that the fabric of our government implies, and the general understanding is, that as the legislature usually proceeds *ex parte,* without hearing the other side, the great maxim of justice, *Audi alteram partem,* is controlling, and that where two grave adverse interests are involved, their rights must be brought to judicial hearing and test. Such is the decree in this matter of our courts, federal and state. But while the rates fixed by the legislature are not absolutely conclusive, they are well-nigh so;[67] they must be transparently unreasonable to be overthrown; they are more than *prima facie* reasonable.

"Courts assume that the legislature intended to promote the public interests, and where the act admits of two constructions, one making it in furtherance of those interests, that will be given it." If it may serve such interest, it is enough.[68]

"Courts will not inquire into the motives of legislators in enacting laws, except as they are disclosed on the face of acts, or be inferable from their operation,

[66] Chicago, etc., Co. v. Minnesota, 134 U. S. 461.
[67] People v. Budd, 117 N. Y. 25.
[68] People v. Warden, 144 N. Y. 529.

considered with reference to the condition of the country and existing legislation. The motives of legislators, considered as to the purposes they had in view, will always be presumed to be to accomplish that which follows as the natural and reasonable effect of their acts."[69] On this principle I would think the presumption would be that a fair, impartial motive in fixing railroad rates to promote the public weal as well as accord the railroad its rights existed. The courts can not establish rates; but may enjoin the enforcement of unjust rates, and call for their reestablishment by the legislature, or the state board charged with the duty.[70] In the Reagan Case the court says that it would not declare that there might not be a case where rates not allowing any return on investment might be tolerated, as in cases where money had been wasted in construction, or in inordinate salaries or other profligacy. The cases seem to say that where the rates fixed by the legislature secure some return on the investment, the legislation is valid. Where the legislation goes further than mere regulation, and deprives the company of its legitimate control, or has other features than mere amount of charge, which take from it the cast of legitimate police action, it is not valid.

Board to Fix Rates.—The legislature may itself by its act fix rates of freight or passage, or, as is done in most states, constitute a board or commission to adjust rates, and make legitimate, general regulations for railroads.

[69] Soon Hing v. Crowley, 113 U. S. 703.

[70] Reagan v. Farmers Loan, 154 U. S. 400; San Diego Water Co. v. City, 62 Am. St. R. 261.

Such board is an administrative body, not legislative, constituted to carry out the will of the legislature.[71]

This doctrine of state power to control railroads and fix rates is asserted by many state cases.[72]

State Regulation of Rates Applies to Other Companies besides Railroads.—It will not be out of place to repeat, for emphasis, that this power of the state to make rates and other regulations *bona fide* for public good is not only applicable to railroads, but applies to individuals, with or without state license, or to corporations devoting property to public use, so that the general public has an interest in such use, in any business not in nature private, but closely in touch with the public. The public weal demands this power. It is justified under the police power, and is consistent with the Fourteenth Amendment. Munn v. Illinois[73] and other Supreme Court cases so hold. So do state cases.[74]

This subject, especially as to railroads, is of grave and daily importance, and therefore I have devoted consider-

[71] Reagan v. Farmers Loan, 154 U. S. 362.

[72] Railroad Co. v. Transport Co. 25 W. Va. 324; Ruggles v. People, 91 Ill. 256; Railway v. Railway, 30 Ohio St. 604.

[73] 94 U. S. 113.

[74] San Diego Water Co. v. City, 62 Am. St. 261 (Waterworks); People v. N. Y. 145 U. S. 175 (Electric Works); Missouri Co. v. Mackey, 127 U. S. 205 (Fellow-servants); Spring Valley Co. v. Schlotler, 110 U. S. 347 (Waterworks); State v. Columbus, 34 Ohio St. 572, 32 Am. R. 390; Nash v. Page, 80 Ky. 539, 44 Am. R. 490 (Tobacco Warehouse); Hacket v. State, 105 Ind. 250, 55 Am. R. 201 (Telephone); Parker v. Metrop. Co. 109 Mass. 507 (Ferry); State v. Gadner, 58 Ohio St. 599, 51 N. E. 136; Dent v. W. Va. 129 U. S. 114 (Physicians); State v. Webster, 50 N. E. 750, 41 L. R. A. 212 (Physician); 14 L. R. A. 581 (Dentists); The Bread Case, Mayor v. Yuille, 3 Ala. 37 (Regulating price of bread and requiring license to sell it).

able space in the effort to outline the general principles laid down by the courts touching it.

Private Business not Subject to such Regulation.—Conceding the right to the states to enact police regulations where private property is devoted to public use, so far as to give an interest to the public in that use, yet where the business is purely *private* this wide police power does not exist. While guarding the public right and welfare, we must not forget the person's right; we must not submerge the right of the individual in the ocean of public right. There must not be too much government intervention. Where such is the case, government is not free, but tyrannic. Was it Jefferson who said, "The world is governed too much"? Government was not originated to be either tyrannic or merely paternal. All men are free by nature. They have certain inalienable rights, says the Declaration of Independence. When they enter into the body politic they do not give up these rights. They have not done so in words, and no mere implication arising simply from their membership in the civil organization should be indulged in to divest them of these rights. They have right of life, right of property, and with the aid of property as a handmaid to earn a livelihood in their own ways, not harming others. They have right to labor, right to contract, right to do business. These are rights of liberty, inhering in and sheltered by the word "liberty" expressed in the Constitution, as above shown. Legislation for the high public behest of public safety and welfare can justly detract from those rights, but not otherwise. No call but a necessary public want can do so. The public must have, in the instance of the particular act

of government, a right to demand it. All the law of police as shown in preceding pages, tells us this. As Webster said, every act of the legislature, though such in form, is not due process of law; so every act claiming to be an act of police, is not necessarily one of legitimate police. I have elsewhere cited authority for this.[75] Many acts sought to be justified by the police power, when brought to judicial test, have been overthrown because wanting the true quality of police. I have elsewhere given instances of this (p. 173). Take the West Virginia act prohibiting persons engaged in coal-mining from issuing in payment of wages any order on a store or paper payable in anything else than money. In State v. Goodwill[76] it was held violative of the Fourteenth Amendment, because it forbade certain contracts by coal operators, thus bearing not on others, and denying equality before the law, and infringing upon the liberty of both employer and employee to purchase and sell labor for what the contracting parties might choose. The court held: "It is not competent for the legislature, under the constitution, to single out owners and operators of mines and manufacturers of every kind, and provide that they shall bear burdens not imposed on other owners of property or employers of labor, and prohibit them from making contracts which it is competent for other owners of property or employers of labor to make. Such legislation can not be sustained as an act of the police power." The opinion by the eminent Judge Snyder is a lucid exposition of constitutional law.

[75] See cases cited in Palmer v. Tingle, 55 Ohio St. 423.
[76] 33 W. Va. 179, 25 Am. St. R. 863.

In another West Virginia case[77] an act prohibiting persons engaged in mining and manufacturing, and interested in selling merchandise, from selling to employees at greater percent than to others, was held contrary to the Fourteenth Amendment, because it was class legislation, and an interference with the freedom of contract, both in employer and employee. The court said: "The statute is a Procrustean bed. It consigns all sizes and conditions to the same measure of treatment, regardless of their differences. It excludes all freedom in trade, and all considerations of mutual benefit, and even charity. If the employer sells goods to the family of some friend in indigent circumstances at less than cost, then, under this statute, he must sell at the same price to all his employees. But it is unnecessary to illustrate the vices, the crudities and the injustice of the statute. That it is an attempt to do for private citizens, under no physical or mental disability, what they can best do for themselves, is apparent. It selects miners and manufacturers as a class, and denies to them privileges which are not only proper and legitimate in themselves, but also to some extent necessary and unavoidable in the conduct of business; privileges which concern private affairs solely, and which are enjoyed by all other classes of citizens. It is an attempt on the part of the legislature to do what, in this country, can not be done; that is, prevent persons who are *sui juris* from making their own contracts. The act is an infringement alike of the right of the employer and the employee. More than this, it is an insulting attempt to

[77] State v. Fire Creek Co. 33 W. Va. 188, 25 Am. St. R. 891.

put the laborer under legislative tutelage, which is not only degrading to his manhood, but subversive of his rights as a citizen of the United States. Godcharles v. Wigeman, 113 Pa. St. 431, 6 Atl. R. 354." Such acts violate principles of liberty, as heretofore explained (p. 00). They deny equality before the law. They violate the state constitution; they violate the Fourteenth Amendment.

In a later case[78] similar principles were involved. One act forbade the issue of scrip, token or draft not payable in money in payment of wages. Unlike the act involved in the Goodwill Case, it applied, not to coal operators only, but to all. Thus it was not class legislation. The other act required coal operators to weigh coal and pay for it weighed in the rough before being "screened" for market. The case is erroneously published. It is published as if the syllabus were law in West Virginia. It is not, the court being equally divided, and therefore the case is not law except in the particular case by affirmance of the judgment below. The author took part in the decision of the case, and denied the validity of the acts on the ground that the business acted upon by the "screening act" was private business, not so in touch with the public as to justify regulation in its conduct under the police power; and also because both acts infringed upon the right of private contract, impairing the right essential to both employer and employee to con-

[78] State v. Peel Splint Coal Co. 36 W. Va. 802, 15 S. E. 1000. See Harding v. People, 160 Ill. 459, 52 Am. St. R. 344, holding such legislation void. See also lucid case, Harbison v. Knoxville Iron Co. 103 Tenn. 421. *In re* Preston (Ohio, Nov. 1900), 59 N. E. 101, holds screening act void.

tract for labor on such terms and payment as might be agreed, and denying liberty and depriving of the use of property without due process. The right of lawful contract in the conduct of lawful business, by persons competent to contract, can not thus be infracted. Every business is to a degree public; the coal operator's not more so than, not as much as, the farmer's; and who would deny the farmer privilege to contract in the conduct of his business? Such legislation has been held invalid in some states, valid in others.

The acts against paying wages in orders on stores redeemable not in money, but in commodities, spring from the English "Truck Act" of 1831, or rather from old acts commencing as early as 1464, first touching one kind of manufacture, then another, then many. They are born of the good motive of protecting men of small means dependent upon their labor for bread, and placed in the power of wealthy employers, and therefore compelled to contract for the sale of their labor at a disadvantage; and the acts go upon the theory that they are legitimate police regulations, because the business they touch "is affected with a public interest," and that where this is so, the legislature may legislate for the general weal, as in the case of railroads and other common carriers, or gas or water companies for public supply, or hotels, mills, warehouses and the like, under principles stated above (p. 185) from Munn v. Illinois.[79]

On the other hand, it is asserted for the other view that coal-mining or other like *private* business is by com-

[79] 94 U. S. 113.

mon law not like common carriers and others just named; that it is not monopoly; that the public is not compelled to resort to those who sell coal, wood, grain or animals, though they do deal with the public in things necessary for subsistence or convenience, as all in any business must do. License from the public is not necessary to carry on these vocations. And they say, moreover, that this is a free government, where everybody has a right to earn a living and pursue happiness by selling his labor or his goods, or making any legitimate contract, a right of liberty and a right of property embedded in the Constitution. They say that in a free government all these rights must exist, and that mere accidental hardships can not be relieved by infraction of fundamental principles of equality before the law. Locke stated the rule for legislators now incorporated in the equality clause of the Fourteenth Amendment: "They are to govern by promulgated, established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favorite at court and the countryman at the plow."

In Commonwealth v. Perry[80] an act that the employer should not deduct from wages for bad weaving, as per contract, was held void as a denial of the right "of acquiring, possessing and protecting property." The act made a man pay for bad weaving, though he would not have to pay for a badly-built house—class legislation.

In Frorer v. People[81] an act requiring wages to be paid in money, prohibiting those engaged in mining and manufacturing from having "truck stores" for selling or

[80] 155 Mass. 117, 31 Am. St. R. 533.
[81] 141 Ill. 171.

furnishing to laborers groceries, clothing, tools, etc., was held unconstitutional as class legislation, placing burdens on some persons not imposed on others, and impairing the right of contract; but as to matters wherein mining and manufacturing differed from other industrial branches they were subject to legislative regulation; but keeping a store was a lawful business, not connected with mining or manufacturing; that the right to contract is both liberty and property, and denial of it a deprivation of both; that if A is denied right to contract and acquire property as before, and others are left free to do so, A is deprived of both liberty and property; that the police power is limited to the protection of comfort, safety and welfare of society, but under it one can not be deprived of a constitutional right, such as the right of an adult of sound mind to make contracts as to labor and acquisition of property, under pretence of giving such person protection. In Ramsey v. People [82] an act requiring coal to be weighed before screening and the mining to be paid for on such weight, was held to deprive of liberty and property and right of contract without due process.

In Bracewell v. People [83] an act requiring weekly payment of wages by corporations was held violative of liberty, class legislation, deprivative of right to contract and acquire property.

So an act declaring void all contracts for mining coal in which weighing coal at mines was dispensed with was held unconstitutional.[84]

[82] 142 Ill. 380. So *In re* Preston, 59 N. E. 101.

[83] 147 Ill. 66, 37 Am. St. R. 206.

[84] Millet v. People, 117 Ill. 294, 57 Am. R. 869.

In another case[85] an act prohibiting any persons or corporations engaged in manufacturing or mining from paying wages in any order not redeemable in money, but in goods at the store of the person or corporation issuing it, was held to violate due process of law.

An act forbidding any payment of wages by a manufacturer in anything but money was held void "inasmuch as by it an attempt is made to do what in this country can not be done, that is, prevent persons who are *sui juris* from making their own contracts."[86]

"The legislature can not interfere with the right of parties to contract on matters purely and exclusively private, unaffected by any public interest or duty to society, to person or government."[87]

The Fourteenth Amendment does not guarantee the right to contract within the state contrary to its laws.[88]

I hardly think that Shaffer v. Union Company[89] can be said to hold squarely against the above principles, the main question in it being the prohibition of the assignment of wages by employees; a doubtful decision, as it seems to me, because it took away from a certain class of people the right to sell a debt, that is, property, leaving the right open to others.

An Indiana statute prohibited a contract in advance to receive wages in anything but money, and it was held valid as protecting and maintaining lawful national

[85] State v. Loomis, 115 Mo. 307.

[86] Goodcharles v. Wigeman, 113 Pa. St. 431.

[87] Leep v. Iron Mountain Co. 58 Ark. 407, 23 L. R. A. 264. See White Breast Co. v. People, 175 Ill. 51.

[88] Hooper v. California, 155 U. S. 648; Williams v. Fears, 179 U. S. —, 21 Sup. Ct. 230.

[89] 55 Md. 74.

money.[90] That was given as the reason of the judgment. I should doubt the *rationale* of the decision. Plainly, the thing prohibited by the act could not appreciably militate against the government credit or the efficacy of its circulating medium. It is not certain whether the decision does or does not contest the general principles above stated.

In State v. Wilson[91] is a very able opinion holding valid an act which prohibited the screening of coal before weighing, as regards payment for mining, in cases where it is mined at a certain rate per ton or quantity.

Dayton v. Barton[92] holds an act requiring store orders issued for wages to be paid in money not contrary to the Fourteenth Amendment.

The Kansas act above adverted to, making it unlawful to pay wages in scrip, token or credit order, redeemable in anything else than money, was again held consistent with the Fourteenth Amendment by the Kansas Court of Appeals;[93] but the decision was reversed in the Supreme Court of the state.[94]

An act which prohibited railroad and mining corporations, their officers or agents, doing business in a county from having a store, or any interest in a store, in such county, was held to violate the Fourteenth Amendment, in denying equal protection of the law, and such classi-

[90] Hancock v. Yaden, 121 Ind. 366, 16 Am. St. R. 396.

[91] 7 Kan. App. 428, 58 Pac. 981.

[92] 53 S. W. R. 970. Also Harbison v. Knoxville Iron Co. 103 Tenn. 421.

[93] Haun v. State, 54 Pac. 130, 7 Kan. App. 509.

[94] State v. Haun, 59 Pac. 340, 61 Kans. 146.

fication of corporations and persons as interfered with their liberty.[95]

A late Tennessee case[96] holds that an act requiring those issuing such store orders in payment of wages to redeem the same in money does not violate the Fourteenth Amendment in taking property without due process of law.

The question in such cases as those referred to above is, What is a business "affected with a public interest," so as to justify legislative regulation under the police power? This is a very difficult question. As has just appeared, the courts divide upon it. It is very easy to state general principles, in this instance as in others, but the practical application of those principles to particular cases as they arise is a matter of perplexity and productive of variant decisions.

Inspection and Ventilation of Coal Mines.—Legislation requiring this at the hands of coal operators is very general in the states of the Union, and is designed for the protection of both the lives and health of the thousands of those who toil in the deep, dark coal-mines, amid great and constant dangers from deadly gas that infests them and the foul air in them. The great police power has its plainest application in regulations necessary or expedient for the preservation of the lives and health of the people. It is very plain that this power will vindicate abundantly the enactment of such legislation. It is true that coal-mining is a private business, and so far merely as that feature of it is concerned, some of the ablest

[95] Luman v. Hitchens, 44 Atl. R. 1051 (Md.)
[96] Harbison v. Knoxville Iron Co. 53 S. W. R. 955, 103 Tenn. 421.

courts of the land have sternly maintained, by decisions given in the last preceding pages, that the legislature has no constitutional power to so interfere with such business as to deprive coal operators and their employees of freedom of contract; but that is an entirely different matter from the power of the legislature to so far interfere in such business, private though it be, as to protect the many thousands of people in their health and their lives. Such is the legislation of which we now speak. Nor is the fact that hundreds of thousands of people work in these mines night and day the justification of such legislation. Some have appealed to that consideration to justify the legislature in dictating what shall be the character of contracts between coal operators and their employees, what contracts between them shall be void, how wages shall be paid, saying that the business is so widespread as to touch public interest, and thus justify intervention; but that is no valid argument—the mere size of the business. We must look at the purpose of the legislation, the evil to be remedied or avoided, to test whether given legislation is a legitimate exercise of the police power. Legislation must allow people to make a living; it does not actively help them to do so by intervening between persons competent to contract in favor of the one over the other; but the legislature has the clearest right to legislate to protect the health and lives of the many thousands. Under these principles there has been very little question of the validity of legislation for the inspection and ventilation of coal-mines. An act requiring coal-mines to be inspected and ventilated to protect miners from the foul air and dangerous gases, and

requiring mine-owners to pay the inspection fees, was held to be a valid exercise of the police power, and that such payment of inspection fees was for services beneficial to the owners of the mines.[97]

It has also been held that legislation requiring the inspection of grain and the payment of fees therefor by the grain-owners was lawful legislation.[98]

Delegation of Police Power.—The great police power resides in the state; but it is impossible that the state should itself be present in every instance to enforce police regulations, or that it should provide for the multitudinous instances of its exercise by legislative acts. The whole time of the legislature would be thus consumed; its acts would be endless; the thing would be utterly impracticable. Hence the necessity of the delegation of some of this power to cities and other municipal corporations, and to counties, districts or townships. They are parts of the state government for this purpose. They represent the state in making and enforcing laws proper and appropriate to execute the functions assigned to them as agencies of the state in the administration of government. The delegation of authority to make and enforce such laws is entirely within the competency of the legislature, provided the delegation empowers such municipalities and other subdivisions of the state to exercise only such functions as are appropriate to them. In such case no one who is affected by the ordinances of such municipal corporations or counties, or their enforcement, can

[97] Chicago, etc., Co. v. People, 181 Ill. 270; Consol. Coal Co. v. People, 186 Ill. 134.

[98] People v. Harper, 91 Ill. 357.

complain that he is deprived of his property or liberty contrary to the Constitution without due process of law.[99]

Municipal Ordinances, to be valid as an exercise of police power, are presumed to be reasonable and necessary, and to make them invalid, he who asserts that they are not a reasonable exercise of the power, must show it; but if unreasonable or oppressive and destructive of private right, and such ordinances do not reasonably tend to carry out the purposes of the municipal corporation, for which it exists, do not tend in any degree to execute its lawful functions, the courts may hold such ordinances void.[100]

Municipal Corporations can not Delegate Their Power.—Whilst a state may, in certain cases, as just shown, confer on municipal corporations, and other subdivisions of the state, power to enact and enforce ordinances and resolutions within the scope of their assigned authority, they can not again delegate to any of their officers or others such powers as are legislative in their nature. Here applies the maxim, *Delegata potestas non potest delegari,* delegated power can not be redelegated. The municipality may commit to certain officers the performance of mere ministerial functions, or judicial functions in the enforcement of its laws; but it can not delegate the power to make law. The powers of a municipal corporation

[99] Walker v. Jameson, 140 Ind. 591, 49 Am. St. R. 222; Town v. Davis, 40 W. Va. 464; 32 Am. & Eng. Corp. Cas. 374.

[100] Town v. Davis, 40 W. Va. 464; Teass v. St. Albans, 38 W. Va. 1; Mayor v. Dry Dock, 133 N. Y. 104, 28 Am. St. R. 609; Note 34 Am. Dec. 633; Steffy v. Monroe, 41 Am. St. R. 436; Noel v. People, 187 Ill. 587.

can not be exercised vicariously.[101] Such an ordinance would not be due process.

Screens before Saloon Windows—Ordinances Requiring Their Removal Held Void.[102]

Cigarettes.—An act forbidding the sale of cigarettes made in or out of the state is valid.[103] This legislation is based on the police power of the state to protect and preserve the public health. If the act had made the sale of cigarettes manufactured outside of the state, in original packages illegal, it would likely be void under the commerce clause.

"Later I observe that the Supreme Court, in November, 1900, in Austin v. Tennessee, holds that the Tennessee act forbidding sale of cigarettes wherever made valid, and that the small packages of cigarettes, about two by four inches, loosely thrown into baskets uncovered, brought from another state, were not original packages."

Ordinance against Collecting and Storing Old Rags and Paper in thickly settled parts of a city held a valid exercise of police power for the public health.[104]

City Sanitary Regulations.—Under principles above stated municipal corporations have unquestionable power to make any reasonable sanitary regulation, and declare things public nuisances, if essentially so in nature, and abate them. It can require householders to store garbage

101 Richards v. Clarksburg, 30 W. Va. 491, 20 Am. & Eng. Corp. Cas. 111; City v. Trotter, 32 Am. & Eng. Corp. Cas. 372, and full note.

102 Steffy v. Monroe, 41 Am. St. R. 436.

103 Austin v. State, 101 Tenn. 563, 70 Am. St. R. 703, 179 U. S. 343.

104 Commonwealth v. Hubley, 172 Mass. 58, 70 Am. St. R. 242.

in proper places and in proper receptacles convenient for removal, so as not to breed disease or offend the public.[105]

Hours of Labor in Mines.—A statute limiting hours of labor in mines was held invalid, because not an act of police to protect the health of the public at large, but only miners.[106] How do these cases harmonize with Holden v. Hardy?[107] Such a law was held valid in another case.[108]

Barbers Closing Sunday.—An act requiring barbers to close their places of business on Sunday has been held to be not contrary to the Fourteenth Amendment.[109] Whilst the cases above so hold, yet I observe that similar legislation has been held not constitutional.[110] An act prohibiting barbers from keeping open their bathrooms on Sunday was held unconstitutional, for the reason that it applied to no one else, and denied to the barbers equality before the law, and was class legislation.[111]

Laundries.—An ordinance regulating laundries violates the Fourteenth Amendment, if it confers on municipal authorities arbitrary power, at their own will, without regard to discretion in a legal sense, to give or withhold

[105] Walker v. Jameson, 140 Ind. 591, 49 Am. St. R. 222.

[106] *In re* Morgan (Colo.), 58 Pac. 1071; *In re* Eight Hour Labor Bill, 21 Colo. 29; Low v. Rees Printing Co. 41 Neb. 127. (Full discussion); Ritchie v. People, 154 Ill. 98, 29 L. R. A. 79.

[107] 169 U. S. 366; and Petit v. Minnesota, 177 U. S. 164.

[108] Short v. Bullion, 45 L. R. A. 603.

[109] Petit v. Minnesota, 177 U. S. 164; 20 Sup. Ct. 666; People v. Bellet, 99 Mich. 151, 57 N. W. 1094, 22 L. R. A. 696; People v. Havnor, 149 N. Y. 195, 31 L. R. A. 689; Judefind v. Maryland, 22 L. R. A. 721; Breyer v. State, 102 Tenn. 103. See Hennington v. Georgia, 163 U. S. 299.

[110] Eden v. People, 161, Ill. 296, 32 L. R. A. 659.

[111] Ragio v. State, 86 Tenn. 272.

consent, to carry on laundries, as to persons or places, without regard to the competency of the person or propriety of the place. Administration of an ordinance for carrying on lawful business violates said amendment if it makes arbitrary and unjust discrimination founded on race between persons otherwise in similar circumstances.[112] But an ordinance requiring laundries to be operated only between certain hours in certain districts was held valid. It was said that it was no objection to the ordinance that other business might be carried on within the same hours.[113]

Stated Period for Payment of Wages.—An act requiring the payment of wages weekly was held valid as an act of police by an opinion of all the Massachusetts supreme judges.[114] An act requiring corporation to pay wages monthly was likewise held valid.[115]

Nuisance.—Property may be destroyed. The powers of a municipal corporation for the abatement of public nuisances are very large. We may say that all muncipal corporations are vested with such power under state statutes. They are more essential to municipal corporations than to other agencies of the government. The good order, safety, health, morals, growth and general well-being of cities and towns could not be protected, promoted or secured without this great power. Even without statute a

[112] Yick Wo v. Hopkins, 118 U. S. 356; Soon Hing v. Crowley, 113 U. S. 703; 7 Am. & Eng. Corp. Cas. 646; *Ex parte* Sing Lee, 31 Am. St. R. 218, 24 L. R. A. 195.

[113] Barbier v. Connolly, 113 U. S. 27, 7 Am. & Eng. Corp. Cas. 640; Soon Hing v. Crowley, 113 U. S. 703, 7 Am. & Eng. Corp. Cas. 646.

[114] 163 Mass. 589.

[115] Skinner v. Garnet. 96 Fed. 735.

town may abate a public nuisance; but the power is almost universally in words conferred by statute. A town may abate a public nuisance pursuant to an order of its council, without recourse to any judicial proceeding for the purpose, and this is due process of law warranted through centuries by the police power, and therefore no violation of the Fourteenth Amendment. And, if necessary for the abatement or removal of the nuisance, the town may destroy the thing which creates such nuisance, and it is not a taking of property without due process of law.[116] The property constituting the nuisance must not be destroyed further than necessary. The summary proceeding here spoken of is warranted by law, and the party is not entitled to a jury in it.[117] Whilst this power of summary abatement without judge or jury exists in a municipal corporation, for prudential reasons the city or town may prefer to appeal to a court of justice for the abatement of a public nuisance, and it is often the better course. If the nuisance is not a plain nuisance *per se,* or if there be reasonable question whether it is an abatable nuisance, or where no circumstances of emergency call for hasty action; in such cases, it is the judicious course, and, as elsewhere stated (p. 147), a court of equity

[116] Mugler v. Kansas, 123 U. S. 623; Lawton v. Steele, 152 U. S. 133; Bank v. Sarlis, 28 Am. St. R. 185; Cheek v. City, 4 Am. & Eng. Corp. Cas. 512; City of Cleveland v. C. C. & St. L. Co. 93 Fed. 119; Easton R. R. Co. v. Easton, 133 Pa. 505; Cook v. Harris, 61 N. Y. 448; Baumgartner v. Hasty, 8 Am. & Eng. Corp. Cas. 353.

[117] Hart v. Mayor, 9 Wend. 571, 24 Am. D. 165; *Ex parte* Keeler, 55 Am. St. R. 785.

is open for relief.[118] If a dwelling, it must do so.[119] The city or town may cause an indictment to be found, and upon it judgment of abatement may be rendered.[120] But it must be remembered, as elsewhere stated (p. 173), that a city or town council can not, by its mere declaration that a thing is a public nuisance, make a nuisance of that which is not essentially such.[121] The question of nuisance or no nuisance is one for judicial review.

Fencing Railroads.—Acts requiring this are valid acts of police, not depriving the companies of the equal protection of the law secured by the Fourteenth Amendment. They are intended not only to save stock from being destroyed, but also to save passengers from accident.[122] This case holds valid an act giving land-owner pay for watching stock to keep it off the track.

An act making railroad companies liable for double the value of stock killed at a point where the company ought to fence the track, but does not, was held not repugnant to the Fourteenth Amendment.[123]

Slaughter-Houses.—As elsewhere stated (p. 82), the police power of a state is so great that an act of the legislature of Louisiana creating a corporation and giving

[118] Weston v. Ralston, 47 W. Va. 36 S. E. 446; Cheek v. City of Aurora, 4 Am. & Eng. Corp. Cas. 652; Ralston v. Weston, 46 W. Va. 544, 33 S. E. 331; Woodward v. Seely, 50 Am. D. 453, citing 1 Pom. Eq. Sec. 248 note, 2 Story Eq. Sec. 859.

[119] Teass v. St. Albans, 38 W. Va. 1.

[120] Denver v. Mullen, 4 Am. & Eng. Corp. Cas. 304; City of Cleveland v. R. R. Co. 93 Fed. 119.

[121] North Chicago Co. v. Lake View, 2 Am. & Eng. Corp. Cas. 6; Town v. Davis, 40 W. Va. 464; Arkadelphia v. Clark, 27 Am. & Eng. Corp. Cas. 586; Teass v. St. Albans, 38 W. Va. 1.

[122] Minneapolis Co. v. Emmons, 149 U. S. 364.

[123] Minneapolis v. Beckwith, 129 U. S. 26.

it a monopoly for twenty-five years to maintain slaughter-houses, stockyards and landings for cattle, in three parishes, covering the city of New Orleans, and prohibiting all others from doing so within that district, and requiring all cattle intended for sale to be brought there, was held not contrary to the Fourteenth Amendment.[124]

Stopping Railroad Trains.—An act requiring railroad trains to stop at county seats long enough to take up and discharge passengers was held valid, though the railroad was engaged in interstate commerce.[125]

Dogs.—A statute enacting that dogs not on the assessment roll are not entitled to protection, and that for killing them the owner can not recover beyond their value specified in the last assessment of them, and that for killing unruly dogs, and those with no collar on, and those not assessed, was held not to violate the Fourteenth Amendment as destroying property without due process.[126] The opinion contains a fine discussion of the right of property in dogs, and the extent of police power over them.

Oleomargarine.—This much-abused article of food is much better than it has been represented to be. It is settled beyond question that it is a legitimate, merchantable article of commerce, and that a state can not interdict its transportation into it from points outside of it, and the sale of the article in original packages.[127]

[124] Slaughter House Cases, 16 Wall. 36.

[125] Gladson v. Minnesota, 166 U. S. 427; Lake Shore v. Ohio, 173 U. S. 285; Wisconsin, etc., Co. v. Jacobson, 179 U. S. 287.

[126] Sentell v. N. Orleans, 166 U. S. 698.

[127] Schollenberger v. Pennsylvania, 171 U. S. 1; Fox v. State, 89 Md. 381.

This is because of the commerce clause, not the Fourteenth Amendment. But in Powell v. Pennsylvania [128] it was held that the Fourteenth Amendment was not "designed to interfere with the exercise of the police power by the state for the protection of health, the prevention of fraud, and the preservation of public morals," and that an act prohibiting the manufacture out of oleaginous substances other than unadulterated cream or milk, of any article designed to take the place of butter, or any imitation or adulterated butter or cheese, or selling it, or offering it for sale, was a lawful police act to protect public health, neither denying equal protection of law, nor depriving of property without due process of law contrary to the Fourteenth Amendment. In Plumley v. Massachusetts [129] was involved an act to "prevent deception and fraud in the manufacture and sale of imitation butter," in its application to the sale of oleomargarine colored so as to cause it to look like yellow cream butter, and the act was held to be a valid exercise of police power on the theory that it was to prevent fraud in the sale of a false article. The case was based on the prevention of deception in selling an adulterated article, and it contains an able discussion of the police power. On this theory goes the cases of State v. Myers, and Wright v. State.[130] But I do not understand that legislation to prevent the sale of oleomargarine in its true state and appearance, without anything connected with it to deceive as to its true character, would be constitutional.

[128] 127 U. S. 678, 23 Am. & Eng. Corp. Cas. 18.

[129] 155 U. S. 461.

[130] 42 W. Va. 822, 35 L. R. A. 844; 88 Md. 436. See State v. Sherwood, 83 N. W. 527; Cook v. State, 110 Ala. 40.

The definition of oleomargarine as a legitimate article of interstate commerce, as given in the Act of Congress, August 2, 1886, is an article "made in imitation and semblance of butter." As such it is a lawful article of commerce, and no state can prohibit its introduction or sale, as held in Schollenberger v. Pennsylvania, 171 U. S. 1. But the state may prohibit the manufacture of it within the state or prohibit the sale within it of such oleomargarine as is manufactured within the state. Fox v. State, 89 Md., 381, 73 Am. St. 194. Still, the state may adopt police regulations to prevent the fraudulent sale of oleomargarine as genuine butter.

Protection of Servants.—The State of Arkansas passed an act providing that if a corporation or person operating a railroad or bridge, or constructing works, discharged, with or without cause, or refused to further employ an employee, his unpaid wages should be due at discharge or refusal to employ, and that if such wages should not be paid, imposing as a penalty that the wages should continue for sixty days at the same rate, and giving action for discharge without cause. The act was held to be consistent with the United States Constitution, and that it did not deny the operator of the railroad the equal protection of the law.[131]

Protection of Fish.—A state may preserve fish in its streams from extinction by prohibiting exhausting methods of fishing, and may authorize the destruction by anyone of nets set in violation of law, and such legislation does not deprive one of property without due process of

[131] St. Louis Co. v. Hall, 173 U. S. 404.

law.[132] The legislature may limit the season for catching fish, and the manner of catching them, and may make it an offense to have certain nets in possession.[133]

Water-Rent Lien.—An act making water rent of a city a lien on land prior to all incumbrances, like taxes, does not violate the Fourteenth Amendment in giving a lien prior to mortgages in existence before the furnishing of the water, as the law prior to the mortgage so provided, and the mortagee took his rights with an eye to that law, in legal contemplation.[134]

Pollution of Streams.—Acts to prevent the pollution of streams by the deposit of sawdust or other vitiating article therein, spoiling the water for domestic and other uses necessary to society, do not violate the Fourteenth Amendment.[135]

Removal of Railroad Grade Crossings.—Crossings of public highways over railroads on a level grade with the railroad are exceedingly dangerous to the lives and limbs of those traveling the common highway, as well as to the employees, passengers and property on the trains upon the railroad, and legislation calculated to save life at such crossings, reasonably calculated for such purposes, is beneficial to both interests, and is valid under the police power. Even an act requiring the removal of such grade crossings by a railroad company at its expense has been held consistent with the Fourteenth Amendment. Condemnation of property for the purpose, is not taking

[132] Lawton v. Steele, 152 U. S. 133.

[133] State v. Lewis (Ind.), 20 L. R. A. 52.

[134] Provident v. Mayor, 113 U. S. 506.

[135] State v. Griffin, 41 L. R. A. 177. See State v. Wheeler, 44 N. J. L. 88.

of property without due process, though tracks be increased at expense of city.[136]

Eight-Hour Labor Law.—A statute fixing a day's labor in underground mines or workings at eight hours, except in emergency, where life or property is in imminent danger, and imposing a penalty for violation of the law, was held a valid exercise of the police power not violative of the Fourteenth Amendment by denying equal protection of the law, or depriving of property without due process of law.[137] Cases holding *contra*.[138]

Waste of Natural Gas.—Natural gas is a gift of nature for the comfort, convenience and welfare of man. It behooves all to preserve it from waste, as it is believed to be, or perhaps known to be, stored in limited quantities within the earth, and therefore exhaustible. The power of the legislature to prevent its waste would seem, therefore, to be clear, and it has accordingly been held that an act prohibiting its use for illumination in flambeau lights is no violation of the Fourteenth Amendment in depriving of liberty, property or equality before the law.[139]

Food Adulteration, Bad Milk, etc.—Under the police power of the state, as elsewhere in this work defined, it is very plain that the state may protect the public health, comfort and safety by prohibiting the adulteration of arti-

[136] New York, etc., Co. v. Bristol, 151 U. S. 556; Wheeler v. R. R. 178 U. S. 321.

[137] Holden v. Hardy, 169 U. S. 366; Short v. Bullion (Utah), 45 L. R. A. 603.

[138] City v. Smyth, 60 Pac. 1120; *Re* Morgan, 58 Pac. 1071 (full); Low v. Rees Printing Co. 41 Neb. 127.

[139] Townsend v. State, 147 Ind. 624, 62 Am. St. R. 477.

cles of food, or the furnishing of inferior and deleterious articles hurtful to health and destructive of life, and may, for the prevention of imposition and fraud, regulate the sale of such articles. The Fourteenth Amendment in no wise prevents such salutary legislation, and the legislation may cover a very wide scope. Of the necessity of legislation upon this matter the legislature is almost the sole judge, with the proviso that its action is subject to judicial review.[140] As an instance of the exercise of this police power, an act requiring milkmen to register their stock with the sanitary board of a city, and prohibiting the sale of milk from unsanitary places, was held to be consistent with the Fourteenth Amendment.[141] So an act prohibiting anyone from having in his possession adulterated milk with intent to sell it, was held to be constitutional in State v. Smith.[142]

Adulterated articles of food may be destroyed by a public inspector acting under authority of state legislation.[143]

It will not do to say that such legislation as this, though sometimes severe, can be held to be unconstitutional, as being destructive of liberty, property or equality before the law, because ancient common law fully authorized indictment for such adulteration, made the thing unlawful; and statutes as far back as 51 Henry III, prohibited the sale of corrupted wine or unwholesome flesh.[144] Thus, long before the advent of the Fourteenth

[140] State v. Campbell, 64 N. H. 402, 23 Am. & Eng. Corp. Cas. 12.

[141] State v. Broadbelt (Md.), 45 L. R. A. 433; 89 Md. —, 73 Am. St. R. 201.

[142] 14 R. I. 100, 51 Am. R. 344; State v. Schlenker, 84 N. W. 698.

[143] Deems v. Baltimore, 80 Md. 164, 26 L. R. A. 541.

[144] 4 Bl. Com. 162.

Amendment this adulteration of food was condemned by law as an evil, and legislation in England and America was widespread for its prevention; and, as frequently stated in this work, what was due process of law when this amendment came continues such under it. Accustomed, ordinary legislation and process for remedy of acknowledged evils are not prohibited by it.

Ardent Spirits.—The state or its subordinate agencies may grant or refuse license to sell ardent spirits, as it chooses. Municipal corporations may grant or refuse just as enabling statutes authorize.[145] The license may be taxed as the state or municipality chooses for their several purposes.[146] A city or town may limit the number of saloons in it.[147]

Diseased Fruit Trees may be destroyed under authority of a statute, without judicial inquiry and compensation, if they have disease, such as "yellows" in peach trees, spreading such disease.[148]

Poisons.—Statutes forbidding anyone other than physicians and pharmacists from having opium or other poisons in possession are constitutional.[149] The basis of this legislation is the danger to the public. The health of the public is the supreme law. To it individual right must often yield. There is no state that has not legislation to regulate and restrict the keeping and sale of poi-

[145] Crowley v. Christensen, 137 U. S. 86, 34 Am. & Eng. Corp. Cas. 160; Mugler v. Kansas, 123 U. S. 623, 18 Am. & Eng. Corp. Cas. 614.

[146] Giozza v. Tiernan, 148 U. S. 657.

[147] Decie v. Brown, 167 Mass. 290.

[148] State v. Main, 69 Conn. 123, 36 L. R. A. 623.

[149] *Ex parte* Mon Luck, 29 Ore. 421, 44 Pac. 693, 32 L. R. A. 738.

son. The police power plainly covers it, and did so long before the date of the Fourteenth Amendment. When that amendment came it found this particular power in full life.[150]

Compulsory Vaccination.—Legislation or ordinance requiring it as a prerequisite to attend the public schools, in the absence of the prevalence of smallpox or imminent danger of it, has been held not a valid exercise of the police power.[151] But the presence of danger of the disease has been held in another case not necessary to authorize a school board to require vaccination. Its order to that effect was held not contrary to the Fourteenth Amendment.[152]

Beating Drums on the Street.—A town ordinance against this as a public nuisance was held valid.[153]

Municipal Liability for Mobs.—A municipal corporation is not liable, by common law, for damage to persons and property done by a mob; but in some states legislation makes them so liable. Such legislation is justified by that large power which the state legislature may exercise to control, regulate and govern cities and towns, and it has been held valid.[154] If the right to lay enough taxes to pay the judgment is denied by the legislation, the case secondly cited shows that the owner of the judgment is not deprived of his property contrary to the

[150] See note as to keeping dangerous property, 20 L. R. A. 52; State v. Hay, 35 S. E. 459; Morris v. City, 30 S. E. 850, 42 L. R. A. 175.

[151] Potts v. Brown, 167 Ill. 67.

[152] Bissell v. Davisson (Conn.), 29 L. R. A. 251.

[153] *Re* Flaherty (Conn.), 27 L. R. A. 529.

[154] City v. Manhattan, 178 Ill. 372; State v. Mayor, 109 U. S. 285; Board v. Caldwell (Ohio, 1900); Champaign Co. v. Church, 62 Ohio St. 318.

Fourteenth Amendment. There need be no jury to fix mere amount of damages, as held in last-cited case, if the main fact is found by jury.

Cemetery Lots and Disinterments.—Owners of lots in cemeteries hold the lots subject to the police power of the state, and interment may be forbidden therein, and bodies already therein interred may be removed by authority of the legislature.[155] It seems that municipal corporations have the like power without enabling act.[156]

City Ordinance against Drumming for patronage for hotels, boarding and bath-houses, physicians, quacks and venders of nostrums, held void as to competent physicians, and as to hotels, boarding and bath-houses, they being lawful business.[157]

Estrays.—A statute authorizing the impounding of estrays is a long-used common law proceeding, and statutes authorizing and regulating it are sustained by the police power, and do not violate the Constitution. Municipal corporations may make regulations as to what animals may run at large in the streets, and for impounding those running at large in violation of such regulations or ordinance, without notice to the owner, without its being contrary to the requirement of due process of law. The subject is well discussed by Judge English in the West Virginia case of Burdett v. Allen.[158]

[155] Humphreys v. Church, 109 N. C. 132, 13 S. E. 793, 37 Am. & Eng. Corp. Cas. 489.

[156] People v. Pratt (N. Y.), 38 Am. & Eng. Corp. Cas. 201.

[157] Thomas v. Hot Springs, 34 Ark. 553; 36 Am. R. 24.

[158] Burdett v. Allen, 35 W. Va. 347, 13 S. E. 1012, 37 Am. & Eng. Corp. Cas. 468; Welch v. Bowen, 11 Am. & Eng. Corp. Cas. 334; Folmar v. Curtis (Ala.), 27 Am. & Eng. Corp. Cas. 578.

Opium Smoking.—A strong and signal instance of the extent of the police power is the sustaining of the statute of Washington making the act a penal offense.[159] The decision seems to me to be questionable.

Laundries.—The carrying on of laundries is a lawful, reputable and necessary business, not at all hurtful to, but highly beneficial to, the public, and of great public benefit. In some cases or instances they have been branded absolutely to be nuisances, perhaps owing to some local prejudice against the Chinese, who are largely engaged in this business. Every person within the jurisdiction of the United States has liberty to make a living in a lawful business. He has a right to apply his labor and property to it. This is the clearest right, protected by the Fourteenth Amendment. Laundering is a lawful business, and an ordinance prohibiting it in certain localities simply because it was deemed a nuisance *per se* was held invalid, because repugnant to the Fourteenth Amendment.[160] This holding does not antagonize the decisions already adverted to (p. 215), holding valid statutes or municipal ordinances reasonably regulating the business of laundering. I refer here to ordinances absolutely declaring the business a nuisance.

Removal of Diseased Persons.—A statute or city ordinance authorizing persons affected with smallpox or other contagious or infectious disease to be removed to a separate house apart from the community, called a "pest-house," or "lazaretto," does not violate the Fourteenth Amendment in depriving of liberty. Nor does the quar-

[159] Territory v. Ah Lim, 9 L. R. A. 395.
[160] *In re* Hong Wah, 82 Fed. 623.

antining of such persons within their own homes, though this prevents the exercise of the right of locomotion. Neither does a quarantine against the entrance into a city or town of any person, diseased or not, coming from a place infected with smallpox or dangerous contagious disease. Seemingly this is a great invasion of natural, personal right; but it springs from the maxim, *Salus populi suprema lex est.* Necessity, the demand of self-preservation, justify the exercise of this power. It is based on the police power, which, as held in Barbier v. Connolly,[161] is not impaired by the amendment, because it rests on that maxim above quoted, which is of the highest import and unquestioned authority. But this doctrine applies only to persons having contagious disease, or infectious disease. If this is not the case, no one, though diseased otherwise, can be sent to a hospital, though for medical aid and humanity, unless he consents.[162]

Act Requiring Locomotive Engineers to be examined as to capacity to distinguish between color signals, and establishing a board therefor, and requiring the railroad company to pay the examination fees, was held not to deny equal protection of the law, or to take property without due process of law.[163]

Removal of Dead Animals.—An ordinance of a city giving one person exclusive right to remove dead animals from a city, not removed by their owner in a given time.

[161] 113 U. S. 27, 7 Am. & Eng. Corp. Cas. 640.

[162] Tiedman, Police Power, Sec. 42; Harrison v. Baltimore, 1 Gill. 264; Haverty v. Bass, 66 Me. 71.

[163] Nashville Co. v. Alabama, 128 U. S. 96.

does not deprive the owner of property without due process.[164]

Railroad Speed.—It seems that municipal corporations, under police power, to save life and property, may regulate the speed of railroad trains within their limits, and such regulation has been held not obnoxious to the Fourteenth Amendment, as impairing a vested right of the railroad company.[165]

Privies and Water-Closets.—A city or town may adopt these principles is, that every state possesses exclusive reasonable regulations controlling them for the public health and comfort, may compel connection with sewers, and may prohibit privies from being located near windows and doors of a dwelling, and may fill them up or destroy them, without hearing, consistently with the Constitution under the police power.[166] The last case is a valuable discussion of police power.

Railroads in Street.—A strong instance of the force of municipal police power is furnished by the case of Railroad Company v. Richmond,[167] where a city ordinance forbade one railroad company to run cars by steam on a part of only one street, and it was held valid, and that it did not deprive that company of property without due process, and that it did not deny equal protection of the law. Though the ordinance applied to only one road and one street, yet the court said that this street occupied by this railroad might be very different from all others, and

[164] National Fertilizer Co. v. Lambert, 48 Fed. 458.

[165] Herb v. Morash (Kan.), 54 Pac. 323; Wisconsin Co. v. Jacobson, 179 U. S. 287.

[166] Comth. v. Roberts, 155 Mass. 281; Harrington v. Board, 20 R. I. 233.

[167] 96 U. S. 521.

municipal legislation might exclude that railroad from one street, though not from all, as the public need required, of which the city was to judge.

Changing Conditions Enlarge Police Power.—It must not be thought that this great police power is bound to recognize a condition or state of things existing to-day as beyond change at its hands in time to come, when changed conditions occur and public welfare demands alteration and increased exercise of police power in restraint of privileges once established. This increased police power, or rather the extended exercise of the sleeping police power, may affect, nay, may destroy, rights vested, even contract rights, under certain circumstances. As stated at another place (p. 170), a business once harmless and lawful, vested even under chartered rights, which later becomes hurtful to the public under an altered condition of things, may be restricted in its transactions, or indeed utterly prohibited under the action of state or municipal legislation touching it. The case of Fertilizing Company v Hyde Park Company[168] is a strong instance to manifest this general principle of the law of police. A company was chartered by a legislative act and empowered to make chemicals from the carcasses of dead animals and other refuse and offal, with express right to so do at a place which was then a swamp several miles from Chicago. The company accepted this charter, spent much money in the erection of a plant and was engaged in its legitimate corporate business. In process of time the town of Hyde Park grew to be an important residential

[168] 97 U. S. (7 Otto), 659.

place. Then this lawful business became a flagrant nuisance of decided type, hurtful to the public. The charter of this town of Hyde Park gave it power, necessary to all cities and towns, without which they could scarcely exist, to abate public nuisances. The town passed an ordinance that no carcasses or offal should be brought into it on railroad cars, and that no public nuisance should be carried on, and imposed a penalty therefor. This was extremely detrimental to the rights and business of the fertilizing company, which had seated itself in that place when it was far removed from habitations, and only a dismal swamp, and the dwellers seated themselves there long after its establishment. We might say they sought proximity to this nuisance by their own act. Still, the Supreme Court held that the town ordinance was a valid exercise of the police power, notwithstanding the charter rights of the corporation. The court fully discusses the police power and the municipal function to abate public nuisance. The court said also that the fact that the corporation had long exercised its right would not protect it from the ordinance, because the business carried on was a public nuisance. The language of the court is but the application of an old principle: "In such cases prescription, whatever the length of time, has no application. Every day's continuance is a new offense."

Second Sentence after Reversal.—Suppose one sentenced under an unconstitutional act, or an erroneous judgment, takes an appeal and reverses the sentence; will it harmonize with due process of law to try him over again and resentence him? Suppose even that he has served a part of his sentence; can he be retried and resentenced

for a full term, regardless of his former sentence and partial punishment under it, if he procures its reversal? I can answer that he can be retried and resentenced, except so far as some statute may relieve him. The former sentence goes for naught. There is no second jeopardy, as he procured a new trial. It is well settled that when a party gets a new trial on his own motion, he may be tried again. It is consistent with the demand of due process of law.[169]

Charges for Use of Public Sewers.—An act authorizing a city to fix charges for the use of its public sewers does not deprive those using them by draining into them, of property without due process of law, though no hearing is given them.[170]

Unlawful Gaming.—Statutes everywhere, of centuries' standing, prohibit gaming with cards and other devices, and not only that, they allow the loser to recover back from the winner money lost at gaming, and they often declare contracts or promises made in consideration of gaming to be void. Do such statutes infringe upon liberty of civil right and action, and right to contract, in violation of the liberty and property clause of the Fourteenth Amendment? Do they infringe upon the right of contract? They do not. It may be said that this money won has become the property of the winner by contract with the loser. So with the promissory note or verbal promise. It would seem to be a restraint on lib-

[169] Murphy v. Massachusetts, 177 U. S. 155; Trezza's Case, 142 U. S. 160; McElvaine v. Brush, 142 U. S. 155; State v. Crop, 44 W. Va. 315; Livingston Case, 14 Grat. 592, 606.

[170] —— 56 N. E. 1.

erty, and on the right of contract, and a taking of property without due process of law. But under the police power of the states, long before the amendment came, such statutes were in vogue for the promotion of morals. The police power vindicates this stringent legislation, and municipal ordinances to suppress gaming. Contracts in gaming are made void, and the recovery back of money lost is a means of enforcing the law.[171]

Usury.—What has just been said as to gaming applies largely here. Statutes vacating contracts tainted with usury, and placing usury under penalty, have been in existence for centuries, have been approved by mankind, and are justified by the police power, and are not in violation of the Fourteenth Amendment.[172]

Registry of Voter.—An act requiring such registry as a prerequisite to vote does not deprive a citizen of the United States of his privileges contrary to the Fourteenth Amendment. The state prescribes the qualification of voters, and makes regulations for elections, as already stated (p. 73).[173]

Railroad Terminal Facilities.—An act compelling a railroad company to admit another company to terminal facilities at a union station and fixing rate for privileges was held not to deprive the former company of property without due process of law.[174]

Log-Boom Charges.—A statute giving a lien for inspecting and scaling logs run through a chartered boom in

[171] Harris v. Runnels, 12 How. 83; Cofer v. Riseling, 55 S. W. 235; Niemeyer v. Wright, 75 Va. 239.

[172] Kreibohm v. Yancey, 55 S. W. 260; Adler v. Corl, 15 Mo. 149.

[173] State v. Mason, 55 S. W. 636; Mason v. Missouri, 179 U. S. 328.

[174] State v. Jacksonville Terminal (Fla.), 27 So. R. 225.

favor of the surveyer general for his lawful fees and charges, and making the lien on such logs enforcible against them, was held not to deprive their owners of property without due process of law.[175]

Possession Pendente Lite of Property Sued for.—Statutes are to be found like that in the West Virginia code[176] in actions of detinue and replevin for the recovery of specific personal property, and also in actions of unlawful entry for the recovery of realty, providing that the claimant may get from his adversary, and hold pending the suit, possession of the property in controversy, such possession to abide the result of the suit, by giving bond. This takes from the defendant actual possession of property prior to judicial ascertainment of the right, thus materially detracting from the right of the other party, and it might therefore be thought to deprive him of property, and that without due process of law; but it has been held not to be so.[177]

Preferred Lien for Labor.—A statute giving servants and laborers a preferred lien for compensation on the property of their employers sold under execution for debt, such lien not to exceed one hundred dollars for services rendered within sixty days, has been held not to take property without due process of law.[178]

Patented Articles, Sale of.—We must not think that because the United States under its patent laws has granted a patent right upon any article, that it may be sold in the

[175] Lindsay & Phelps Co. v. Mullen, 176 U. S. 126, 20 Sup. Ct. 325.
[176] Ch. 102.
[177] State v. Prather, 19 Wash. 336.
[178] Gleason v. Tacoma, 16 Wash. 412.

states regardless of its character as calculated to injure the public as to health, morals or otherwise. The patent is granted only in the interest of the patentee, to give him a reward for his invention by way of a monopoly against competition for a number of years, and was never designed to adjust any rights between the patentee and the public interests under the police power. Hence a state may, by an act of police, that is a legitimate exercise of police power, prohibit the sale of any patented article, if in anywise deleterious to the public.[179]

Privilege Clause prohibiting states from abridging the privileges and immunities of citizens of the United States, like the clauses in relation to life, liberty and property and the equal protection of the law, is subject to the rightful police power of the state, and was not designed to restrict that power.[180]

Inspection of the Body.—Can a plaintiff in a civil, personal action suing for injury to his person be required, against his will, on motion of defendant, for purposes of evidence on the trial, to submit to a surgical or other examination of his body? In Union Pacific Railway Company v. Botsford[181] this power is denied in the holding that "A court of the United States can not order a plaintiff in an action for injury to the person, to submit to a surgical examination in advance of the trial." The opinion by Justice Gray enunciates the principle that no right is more sacred or more carefully guarded

[179] Patterson v. Kentucky, 97 U. S. 501.

[180] U. S. v. Cruikshank, 92 U. S. 542; *In re* Kemmler, 136 U. S. 436.

[181] 141 U. S. 250.

by the common law than the right of every individual to the possession and control of his own person, free from all interference by others, quoting Cooley on Torts, 29, "The right of one's person may be said to be a right of complete immunity; to be let alone." Not only wearing apparel, but a watch or jewel, worn on the person, is for the time being privileged from being taken under distress for rent or attachment or execution.[182] The court said that inviolability of person is as much invaded by compulsory stripping and exposure as by a blow; that to compel any one, especially a woman, to lay bare the body, or submit it to the touch of a stranger, without lawful authority, is an indignity, an assault and trespass, and no order or process commanding such exposure was ever known to the common law in the administration of justice between individuals, except in a very small number of cases based upon special reasons, and upon ancient practice, coming down from ruder ages, now mostly obsolete in England, and never, "so far as we are aware," introduced into this country. Justice Gray then refers to the old practice of inspection of the body without jury to test infancy or identity of person; or, to test maihem or no maihem in an action of trespass for maihem or atrocious battery, on the motion of the plaintiff himself after verdict to increase damages. He said that these inspections were not for submitting the results to a jury. He also instanced the practice in divorce cases of inspection to determine impotency, as resting on the public interest in upholding or dissolving marriage, and he said this

[182] 3 Bl. Comm. 8.

was civil law as administered in ecclesiastical courts, not common law. Justice Gray also spoke of the instance of the writ *de ventre inspiciendo* to ascertain whether a condemned woman was pregnant, and he stated that this was based on the public interest that the life of an unborn child should not be taken. These instances were treated in the opinion as not forming the rule, as not calling for the enforcement as a means of evidence in civil cases of such inspection of the body. The opinion refered to a number of state decisions holding the contrary, and expressed strong dissent from them. The opinion said that the state decisions in this mere matter of practice and evidence would not control federal courts. The majority of the court condemned the rule prevalent in many of the state courts. Justices Brewer and Brown dissented. All conceded that if the plaintiff refused to yield to such inspection for purposes of evidence to the jury, the fact of refusal might be legitimately made a subject of comment before the jury to the prejudice of the plaintiff's cause. A later case in the Circuit Court of Appeals[183] follows the case just mentioned, going further in the respect that it holds that such inspection will not be allowed either before or during the trial. The contention in favor of this right of inspection is quite plausible. It is based on the theory that when a man comes into a court of justice asking at the hands of the law reparation for an injury done him by his fellow-man, justice demands that he make a full breast of his case, suppressing nothing, exposing all for the attainment of truth and justice. The

[183] Illinois Central v. Griffin, 80 Fed. 278.

state cases are conflicting. Jones on Evidence[184] asserts the true rule to be contrary to the decision of the Supreme Court and Circuit Court of Appeals above stated, citing the cases.[185] I observe that the late case of Wanek v. City of Winona[186] takes the power to allow such inspection as well settled, but does not discuss the subject or cite authorities.

This subject is one of importance. My own view would be that the subject is one concerning "liberty" as used in the federal and state constitutions, and immunity from such corporeal inspection is what Blackstone would call "liberty of person," a great immunity inseparably annexed to the personality of a human being, sacred unto him, which no call of even justice can invade under the Constitution, and I would think that the principles stated by the Supreme Court of the United States are sound as an original question. If Justice Gray is right in stating that the common law did not accord this right of inspection, as I think he is, then we can not say that common law practice precedent to the adoption of the American constitutions or the Fourteenth Amendment gave this right of inspection, and as this right of exemption from it is one of liberty, it would be protected by the Fourteenth Amendment, as well as by the state constitutions, and the enforced inspection would take away liberty without due process of law. But we must be careful here. We must remember the Supreme Court was only laying down a

[184] Vol. 2, Sec. 398.

[185] Graves v. Battle Creek, 95 Mich. 266, 19 L. R. A. 641; White v. Milwaukee, 61 Wis. 536, 50 Am. R. 154, note 14 L. R. A.; Sidekum v. St. L. Co. 93 Mo. 400, 3 Am. St. R. 549 and note.

[186] 80 N. W. R. 851.

rule of practice and evidence for national courts, though, as I read the opinion, it stated general, fundamental principles of constitutional law. In those states where the rule of evidence established before the amendment came, allowed such inspection, I suppose such rule would not be interfered with by the amendment; but in states where it was not established as legitimate procedure, I would doubt the power to enforce such corporeal inspection, though the matter be one pertaining to mere evidence and procedure.

After writing the foregoing matter upon the subject, I find the case of Camden Co. v. Stetson,[1] holding that if there is a state statute allowing such inspection, a federal court in that state will enforce inspection of the body. The case seems to recognize the validity of the statute impliedly, but does not discuss the constitutional question. Railroad Co. v. Childers[2] holds such a statute valid. But such inspection can only be granted where the person to be inspected is the plaintiff, and only by dismissal of the case.[3]

Osteopathy.—This new word is composed of two Greek words, literally meaning the restoration of bone. It is practiced by some for the cure of ailment by a process which rejects the use of drugs or medicine, and substitutes a system of rubbing and kneading of the body. Does this practice fall under those statutes like that involved in Dent v. West Virginia,[187] prohibiting the practice of med-

1 177 U. S. 173.
2 82 Ga. 719.
3 Bagwell v. Atlanta, 109 Ga. 611, 34 S. W. 1018.
187 129 U. S. 114.

icine and surgery without a certificate of authority from the medical board constituted under the police power by state statute for the regulation of such practice for the public welfare? Both are for the cure or treatment of human ailment. Incompetency in the one is as deadly as in the other. Do those who follow the practice of faith cure or christian science or spiritual healing fall under these laws? There has been great controversy in the various states upon these matters. Those who practice such healing claim that the right is of the highest import, one of liberty, the right to make a living, the right to contract, the right to pursue a calling and secure happiness. It is very clear that under the high behests of public health and safety of life the state may, under its police power, regulate such practices, or, under proper circumstances, prohibit them. Whether osteopathy and other practices mentioned fall under such statutes is dependent upon the phraseology of the statute. In Ohio is a statute providing that one practicing medicine or surgery must have a certificate of authorization from a state board, and that anyone should be, under the statute, deemed to practice medicine or surgery who signed himself M. D., or prescribed or recommended "any drug or medicine or other agency for treatment." It was held in State v. Leffring[188] that osteopathy was not "an agency" under the statute, and that an osteopath was not amenable to the statute. On the other hand, it was held that to treat or operate upon a person for physical ailment by rubbing the affected part is a treatment or operation for physical

[188] 55 N. E. R. 168.

ailment, and is practicing medicine within the meaning of the act to regulate the practice of medicine, which provided that anybody shall be regarded as practicing medicine who shall treat, operate on or prescribe for any physical ailment.[189]

Free Passage on Railroads.—An act requiring it of railroads for shippers of stock was held contrary to the Fourteenth Amendment as depriving the railroad company of property without due process of law and as denying equal protection of the law, in Atchison, Topeka & Santa Fe v. Campbell,[190]

Penalty on Injunctions.—An act imposing a penalty of fifty percent interest for an injunction against taxes not sustained was held not contrary to the constitution as depriving the party of property without due process.[191]

Taking Water Without Pay.—A municipal corporation taking the water from another's land without compensation takes property without due process of law, contrary to the constitution.[192]

City Assessment.—A statute providing that it should be a first lien on property, and that bonds issued therefor should be conclusive evidence of the validity of the lien, deprives the owner of property without due process of law. As stated elsewhere (p. 194), it was that feature of the statute which made the assessment conclusive evidence of the lien, and thus foreclosed inquiry upon the

[189] Jones v. People, 84 Ill. App. 453; Little v. State, 84 N. W. 248. So is Christian Science, State v. Buswell, 40 Neb. 158.

[190] 59 Pac. 1051 (Kan.).

[191] Missouri, K. & T. R. Co. v. Board, 59 Pac. 383, 9 Kans. App. 545.

[192] Fisher v. City (Utah), 59 Pac. 520.

question, which put the brand of unconstitutionality upon the statute.[193]

Curative Act for Taxes.—The mode in which property shall be appraised for taxes, by whom and when, what certificate of their action shall be furnished by the person or board doing it; when the parties may be heard for correction of errors, are all matters of legislative discretion, and it is within the power of the state legislature to cure omission or defective performance of such of the acts required by law to be performed in the assessment as could have been in the first place omitted from the requirement of the statute, or might have been required to be done at another time than that named in it, provided intervening rights are not impaired.[194]

Bank Officer Receiving Deposits, knowing of bank's insolvency, may be held guilty of a crime, and the act making it crime does not violate the Fourteenth Amendment.[195]

Enticing Away Servants.—A statute forbidding, under civil and criminal penalty, any person from interfering with a tenant or laborer of another during the continuance of a lease or contract, was claimed to deny liberty, the liberty to sell labor and to contract, and as class legislation; but it was held not to violate the Fourteenth Amendment.[196]

This decision of the Mississippi Court might at first be doubted; but as common law makes it actionable for

[193] Ramish v. Hartwell, 58 Pac. 920.
[194] Williams v. Supervisors, 122 U. S. 154.
[195] State v. Darragh, 54 S. W. 226.
[196] Hoole v. Dorroh, 75 Miss. 257.

one man to entice away a servant of another, or to induce the violation of a subsisting contract, the decision is correct.[197]

Solitary Confinement.—A law imposing solitary confinement until execution of death sentence violates the Fourteenth Amendment in its requirement of due process, because it is *ex post facto* as regards offenses committed before the enactment of such law;[198] but it is due process as to offenses committed after the act.[199]

[197] 1 Bl. Com. 429.

[198] Medley's Case, 134 U. S. 160.

[199] Holden v. Minnesota, 137 U. S. 483; McElvaine v. Brush, 142 U. S. 155.

Chapter 13.

JUDGMENT WITHOUT SERVICE OF PROCESS.

I shall not discuss generally judgments and decrees and orders of courts and their effect, because that is an extensive field aside from the purposes of this work. I shall speak of them only as to the question whether they conform to the demand for due process of law contained in the Fourteenth Amendment, and generally in the state constitutions under some phraseology. Frequently this is an important question. Is this judgment or decree binding upon the person and his property, or certain of his property? Or does it so far depart from due and regular procedure as to be without due process of law and void?

Upon principles of justice and authority, no judgment or decree for money, to have the force of a personal judgment or decree, known in law as a judgment *in personam,* that is, one conclusive for all purposes, as *res judicata,* establishing finally between the parties and their privies the existence, the amount and the justness of a debt against the person, enforceable against any and all his property liable under the law for debt, and which is a

finality, not only in the state where the judgment is rendered, but which shall have in other states, under Article IV of the federal Constitution, the same full faith, credit and effect as it has in the state where rendered—no such judgment or decree can be rendered without service of process upon the person unless he appears in the suit. Such a judgment would be void under the state constitution everywhere, and would take the property of the debtor without due process of law, contrary to the Fourteenth Amendment of the federal Constitution. A state can not usurp this power.[1] Justice Field in the great case of Pennoyer v. Neff,[2] which is a notable landmark case under this head, in delivering the opinion of the court very ably and lucidly expounded the general principles of law upon this very grave and important subject. "The several states of the Union are not, it is true, in every respect independent, many of the rights and powers which originally belonged to them being now vested in the government created by the Constitution. But, except as restrained by that instrument, they possess the authority of independent states, and the principles of public law to which we have referred are applicable to them. One of jurisdiction and sovereignty over persons and property within its territory. As a consequence, every state has the power to determine for itself the civil status and capacities of its inhabitants; to prescribe the subjects upon which they may contract; the forms and solemnities with which their contracts shall be executed; the rights and obligations arising from them, and the mode in which

[1] Fowler v. Lewis, 36 W. Va. 112.
[2] 95 U. S. 714.

their validity shall be determined and their obligation enforced; and also to regulate the manner and conditions upon which property situated within such territory, personal and real, may be acquired, enjoyed and transferred. The other principle of public law follows from the one mentioned; that is, that no state can exercise direct jurisdiction and authority over persons and property without its territory. Story, Confl. L. Ch. 2; Wheat. Internat. Law, pt. 2, c. 2. The several states are of equal dignity and authority, and the independence of one implies the exclusion of powers from all others. And so it is laid down by jurists as an elementary principle that the laws of one state have no operation outside of its territory except so far as is allowed by comity, and that no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decision. 'Any exertion of authority of this sort beyond this limit,' says Story, 'is a mere nullity and incapable of binding such persons or property in any other tribunal'. But as contracts made in one state may be enforceable only in another state, and property may be held by non-residents, the exercise of jurisdiction, which every state is admitted to possess over persons and property within its own territory, will often affect persons and property without it. To any influence exerted in this way by a state affecting persons resident or property situated elsewhere, no objection can be justly taken; whilst any direct exertion of authority upon them, in an attempt to give extra-territorial operation to its laws, or to enforce any extra-territorial jurisdiction by its tribunals, would be deemed an encroachment upon the independence of the

state in which the persons are domiciled or the property is situated, and may be resisted as usurpation. Thus, the state, through its tribunals, may compel persons domiciled within its limits to execute, in pursuance of their contracts respecting property elsewhere situated, instruments in such form and with such solemnities as to transfer the title, so far as such formalities can be complied with; and the exercise of this jurisdiction in no manner interferes with the supreme control over the property by the state within which it is situated. Penn v. Lord Baltimore, 1 Ves. 444; Massie v. Watts, 6 Cranch 148; Watkins v. Holman, 16 Pet. 25; Corbett v. Nutt, 10 Wall. 464. So the state, through its tribunals, may subject property situated within its limits owned by non-residents to the payment of the demands of its own citizens (and others) against them; and the exercise of this jurisdiction in no respect infringes upon the sovereignty of the state where the owners are domiciled. Every state owes protection to its own citizens, and when non-residents deal with them, it is a legitimate and just exercise of authority to hold and appropriate any property owned by such non-residents to satisfy the claims of its citizens. It is in virtue of the state's jurisdiction over the property of the non-resident situated within its limits that its tribunals can inquire into that non-resident's obligations to its own citizens, and the inquiry can then be carried only to the extent necessary to control the disposition of the property. If the non-resident have no property in the state, there is nothing upon which the tribunals can adjudicate. . . . If without personal service judgments *in personam* obtained *ex parte* against non-resident and absent parties,

upon mere publication of process, which, in a great majority of cases, would never be seen by the parties, could be upheld and enforced, they would be the constant instruments of fraud and oppression. Judgments for all sorts of claims upon contracts and for torts, real or pretended, would be thus obtained, under which property would be seized, when evidence of the transaction upon which they were founded, if they had any existence, had perished. Substituted service by publication, or in any other authorized form, may be sufficient to inform parties of the object of proceedings taken where property is once brought under the control of the court by seizure or some equivalent act. The law assumes that property is always in possession of its owner, in person or by agent, and proceeds upon the theory that its seizure will inform him, not only that it is taken into the custody of the court, but that he must look to any proceeding authorized by law upon such seizure for its condemnation and sale. Such service may also be sufficient in case where the object of the action is to reach and dispose of property in the state, or some interest therein, by enforcing a contract or lien respecting the same, or to partition it among different owners, or, when the public is a party, to condemn and appropriate it to a public purpose. In other words, such service may answer in all actions which are substantially proceedings *in rem.* But where the entire object of the action is to determine the personal rights and obligations of the defendant, that is, where the suit is merely *in personam,* constructive service in this form upon a non-resident is ineffectual for any purpose. Process from tribunals of one state can not run into another and sum-

mon persons there domiciled to leave its territory and respond to proceedings against them. Publication of process, or notice within the state where the tribunal sits, can not create any greater obligation upon the non-resident to appear. Process sent to him out of the state, and process published within it, are equally unavailing in proceedings to establish his *personal* liability. . . . Since the adoption of the Fourteenth Amendment to the federal Constitution the validity of such judgments may be directly questioned, and their enforcement in the state (of rendition) resisted, on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law. Whatever the difficulty of giving those terms a definition which will embrace every permissible exertion of power affecting private rights, and exclude such as are forbidden, there can be no doubt of their meaning when applied to *judicial* proceedings. They then mean a course of legal proceedings according to those rules and principles which have been established in our system of jurisprudence for the protection and enforcement of private right. To give such proceedings any validity, there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject-matter of the suit; and if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the state or his voluntary appearance."

"A court of chancery acting *in personam* may well decree the conveyance of land in any other state, and may

enforce the decree by process against the defendant. But neither the decree itself, nor any conveyance under it, except by the person in whom the title is vested, can operate beyond the jurisdiction of the court."[3]

Under these principles the case of Pennoyer v. Neff[4] held a personal judgment on mere publication void, so as not to warrant an execution to sell property under it; and that a sale under it conferred no title; and that property must be attached, as against a non-resident, at the commencement of the suit in order to confer jurisdiction. Likewise a later case.[5]

Cross-action and Set-off.—In Massachusetts is a statute providing that if a non-resident sues there, a cross-action may be brought against him by service of its process on the attorney in his action, if the cross-action is for such a demand as may be set off. Held not against the due process clause of the Fourteenth Amendment.[6] In states where statutes allow sets-off in the same action this must be so; but is it so in a separate action? Even in such states can there be personal judgments for surplus against the non-resident? It is not supposed that Dewey v. City[7] contradicts this. In that case a state act assessing on lot owners in a city costs of local improvements and making the owner personally liable was involved. In a suit to sell the lot for such costs the non-resident owner appeared to ask relief against the assessment, and it was re-

[3] Watkins v. Holman, 16 Pet. 25; Dickinson v. Hoomes, 8 Grat. 410; Wilson v. Braden, 47 W. Va., 36 S. E.

[4] 95 U. S. 714.

[5] Overby v. Gordon, 177 U. S. 221.

[6] Aldrich v. Blatchford, 56 N. E. 700.

[7] 173 U. S. 193, 19 Sup. Ct. 379.

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fused and personal judgment was given against him. It was held that the act, while good to charge the lot, was not due process to fix personal liability, and that by appearance for relief the non-resident did not submit himself to jurisdiction for purposes of personal judgment. But that was not a set-off; not the case where the non-resident comes into the court of a state, thus availing himself of its process to get judgment against his debtor, who, in his turn, has a lawful set-off cognizable in that action under state law.

Refusal of Defense.—Though there be service of process, yet if the defendant is not allowed to make his defense, it is a withdrawal of the summons, "a denial of the benefit of a notice, and would in effect be to deny that he was entitled to notice at all, and the sham and deceptive proceeding had better be omitted altogether," because judgment without hearing is void.[8] A court can not strike out an answer and then decree on the merits of the case against the defendant, without such answer, merely because he was held to be in contempt in failing to pay into court the money in controversy.*

Judgments In Rem.—But while to warrant judgments *in personam* there must be service of process in the state or voluntary appearance, yet in all actions in the nature of cases called in admiralty proceedings *in rem,* such as attachments of property of non-residents, or suits to recover property, or suits to foreclose liens on property, and the like—in short, any proceedings of such na-

[8] Windsor v. McVeigh, 93 U. S. 274; Underwood v. McVeigh, 23 Grat. 409; McVeigh v. U. S. 11 Wall. 267.

*Hovey v. Elliott, 167 U. S. 409, 39 L. R. A. 449.

ture—personal service is not requisite to obtain jurisdiction and give the full relief properly pertaining to the nature of the case; but there may be publication of the process or notice of the proceeding, or service of notice outside the state, such as the state law may prescribe, and the judgment will be conclusive and binding as to the particular property or subject attached or operated upon in the proper way in the case. For reasons above quoted from the Supreme Court, this is just as well settled as is the rule that for personal judgment there must be personal service of process. The proceedings here referred to are not technically proceedings *in rem,* as technical proceedings *in rem* are those where the thing is seized in admiralty, and the adjudication binds all mankind, parties or not; but the proceedings just spoken of are properly denominated proceedings *quasi in rem,* binding only the parties interested in the property or subject before the court, and binding them only as to that property or subject, except some proceedings to settle personal *status,* as divorce, or in probate of wills, which bind the world.

It makes no difference what is the form of the proceeding, whether by attachment, action to recover property, real or personal, to partition land, to remove cloud over title, or settle title to land, to probate a will, for divorce, to enforce liens, so it be in nature and substance a proceeding *in rem,* the rule applies. Though not technically *in rem,* it is *quasi in rem,* operative upon the *res,* or thing or matter before the court.[9]

[9] Roller v. Holly, 176 U. S. 398; Arndt v. Griggs, 134 U. S. 316; Cooper v. Reynolds, 10 Wall. 308.

"Jurisdiction is acquired in one of two modes: First, as against the person of the defendant, by the service of process; or, Second, by a proceeding against the property of the defendant within the jurisdiction of the court. In the latter case, the defendant is not personally bound by the judgment beyond the property in question."[10]

Divorce Suits and Others Affecting Personal Status or requiring the execution of deeds. In these cases there may, consistently with the amendment, be judgment or decree without personal service, on publication, as the proceeding is in nature *in rem;* but the law prescribing such constructive notice in place of personal notice must be closely complied with, else the proceeding is void.[11] Though upon publication there can be a decree of divorce, there can be no decree for alimony. That part of the decree would be void, because a personal decree for money.[12]

If the law of the state of the actual domicile of the husband or wife allows a divorce on publication or other constructive service of process, without personal service, the decree of divorce is effectual the world over, and is due process, though the other party was never in the state.[13] But this is not so, unless the statute as to publication of notice is complied with. If it is not complied with, then the decree is void.[14] The actual domi-

[10] Boswell v. Otis, 9 How. 348.

[11] Cheever v. Wilson, 9 Wall. 108; Harding v. Alston, 9 Me. 140; Laney v. Garbee, 105 Mo. 355, 24 Am. St. R. 391.

[12] Bunnel v. Bunnel, 25 Fed. 214; Turner v. Turner, 44 Ala. 450; Coger v. Coger, 35 S. E. R. 823.

[13] Story, Confl. L. Sec. 230; Cheever v. Wilson, 9 Wall. 108.

[14] Cheely v. Clayton, 110 U. S. 701.

cile of either party will make the decree of divorce good, if the law of that state allows a divorce there on publication.[15] If neither party has a domicile in the state, appearance in the suit does not make the decree good.[16]

If a party leave his domicile in one state and go into another, only to get a divorce, and thus acts in fraud of the law to obtain unlawful jurisdiction for his suit, the wife not being served with process, but absent in the former state, the decree is void; it is not by due process. It will not be recognized in another state. To give jurisdiction for divorce, the party asking it must have actual *bona fide* domicile in the state of the suit when the suit begins, as no state has lawful power over citizens of another state or their status.[17]

Such divorces on constructive notice merely are *in rem* final only on the personal status, dissolving the marriage, making the parties no longer man and wife; but the decree must not allow alimony or costs or make provision as to the custody of children or property, and in so far as it does so, it would be void elsewhere, likely in the state itself, because not according to due process; but where the decree is rendered on personal service of process, it is *in personam* and binding as to alimony, costs and custody of children.[18]

[15] Story, Confl. L. Sec. 230a.

[16] Harrison v. Harrison, 20 Ala. 629, 56 Am. D. 227.

[17] Cheever v. Wilson, 9 Wall. 123; Hood v. State, 56 Ind. 263, 26 Am. R. 21; Hoffman v. Hoffman, 7 Am. R. 299; Anderson v. Anderson, 57 N. E. 333 (full).

[18] Bunnel v. Bunnel, 25 Fed. 214.

Condemnation of Land.—In this proceeding for condemnation of land for public use, publication of notice to the land-owner, if non-resident, is sufficient, and is due process of law; but if resident in the state, he must have personal service of notice.[19]

Settlement of Special Administrator.—A statute allowing a special administrator to make a settlement of his accounts, and providing that it shall be conclusive on distributees without notice, held not repugnant to the Fourteeth Amendment. He is like a special receiver in a suit.[20]

Denial of Jurisdictional Facts.—Whilst a judgment in one state on personal service of process or appearance is a finality everywhere on the merits, establishing a debt and precluding new inquiry into the merits of the cause of action, in the courts of another state, not by common law, but only by reason of Article IV of the Constitution and the Act of Congress under it giving the judgment the same faith and credit in other states as it has in the state where rendered, yet when it comes up in another state, it may be denied such force by proof that in fact there was no personal service or appearance, even though the record of the judgment assert that there was. It is settled that the provision of the Constitution giving the judgment in all states the same faith and credit which it has in the state of its rendition does not preclude inquiry into jurisdictional facts; and this on the principle lying at the root of all judicial proceedings binding

[19] Huling v. Kaw Valley Co. 130 U. S. 559.
[20] Ro Bard v. Lamb, 127 U. S. 58.

the person, that we must see that the court had jurisdiction of the subject-matter and the person.[21]

Process on One Partner will not give right to a personal judgment against another, whether the firm is existent or dissolved, and such judgment is void as to him, even if his copartner authorized an appearance for him.[22]

Where a statute allowed a judgment against the firm assets only, but to have no personal effect as to the partner not served with process, the statute was held not to contravene the Fourteenth Amendment.[23]

Escheat, Decree of, on mere publication of notice under a statute allowing it, is valid against all interested in the land, because it is an *in rem* preceeding.[24]

Appearance to Question Jurisdiction.—A statute converted such appearance into a general appearance, and a judgment in such case was held to be according to due process, and not void under the Fourteenth Amendment.[25]

Injunction Against a Citizen restraining him from prosecuting a suit in another state, held lawful under the federal Constitution.[26]

Administration Granted for a Live Man as Dead is not due process of law as to him, and is void.[27]

[21] Thompson v. Whitman, 18 Wall. 457; Stewart v. Stewart, 27 W. Va. 167; Gilchrist v. Land Co. 21 W. Va. 115; Bowler v. Huston, 30 Grat. 266, 32 Am. R. 673.

[22] Hall v. Lanning, 91 U. S. 160; Ferguson v. Millender, 32 W. Va. 30; Boller v. Huston, 30 Grat. 266; 32 Am. R. 673.

[23] Sugg v. Thornton, 132 U. S. 524.

[24] Hamilton v. Brown, 161 U. S. 256.

[25] York v. Texas, 137 U. S. 15.

[26] Cole v. Cunningham, 133 U. S. 107.

[27] Scott v. McNeal, 154 U. S. 34.

Attachment on Property Both In Rem and In Personam.—This may be the case. It is *in rem* if there is only attachment of property; but both *in personam* and *in rem* where the defendant is personally served with process or appears, and his property is attached. In the latter case, a judgment that is both personal and also one subjecting the attached estate may be entered—otherwise only the property can be sold. To make it valid as an *in rem* proceeding there must be levy or seizure of the property; to make it *in personam,* there must be service personal, or appearance in the suit, to be consistent with the demand of due process of law. The judgment is not a personal one, even in its own state, if without personal service or appearance, but affects only the property attached.[28]

Ejectment or Other Suit to Recover Land, or partition it, or a suit to remove cloud over it, or to quiet its title, or cancel a deed for mistake or fraud, or to set aside a deed as fraudulent against creditors, or to foreclose a mortgage on the land, or to subject land to judgment liens or mechanic's liens, and the like, may go upon constructive service of process by publication, as provided in the case by state law, and it will be due process of law under the Fourteenth Amendment, because it is the usual process in such cases, and gives jurisdiction to the court over the subject-matter, and affects the property and its title alone, and imposes no personal liability on the defendant. There can not be a personal judgment for costs in such a case.[29] The proceeding is *in rem,* not *in personam* in such cases. This jurisdictional efficacy of the state courts must nec-

[28] Cooper v. Reynolds, 10 Wall. 308.
[29] Freeman v. Alderson, 119 U. S. 185.

essarily be so, else a state would have no right to act upon or settle title to land within it, where a non-resident claims it, and will not submit himself to its jurisdiction. A state must have power to act upon the title to land within it and subject it to debt or other lawful claim of its own people, or of others asking relief of it. Such proceedings do not violate the Fourteenth Amendment by depriving of property without due process of law.[30]

In Arndt v. Griggs, just cited, it is held: "A state may provide by statute that the title to real estate within its limits shall be settled and determined by a suit in which the defendant, being a non-resident, is brought into court by publication. The well-settled rule that action to quiet title is a suit in equity; that equity acts on the person; and that the person is not brought into court by publication alone does not apply when a state has provided by statute for the adjudication of titles to real estate within its limits as against non-residents, who are brought into court only by publication." In the case is a full general discussion of the principle as applicable to the classes of cases above stated to be valid procedure under publication.

A late signal decision sustains, probably exceeds, the just power of the state to settle and quiet title to lands without regular suit on publication. An act of the legislature established a Court of Registration. Application could

[30] Witten v. St. Clair, 27 W. Va. 762; Pennoyer v. Neff, 95 U. S. 714; Perkins v. Wakeham, 86 Cal. 581, 21 Am. St. R. 67; Young v. Upshur, 42 La. Ann. 362, 21 Am. St. R. 385; U. S. v. Fox, 94 U. S. 315; Arndt v. Griggs, 134 U. S. 316; Adams v. Cole, 95 Mo. 501, 6 Am. St. R. 74; Mellen v. Moline Iron Works, 131 U. S. 352; Wunstel v. Laundry, 39 La. Ann. 312.

be filed with it specifying the land, stating outstanding known interests in it, the name of the occupant of the land, and names of occupants of adjoining land. A description of the land should be filed in the registry of deeds. The case is then sent to an examiner to investigate and report to the court. If that examiner reports that the applicant has good title to the land, or if adverse claim exists, a publication is made in a newspaper to all known to have an interest to come forward and claim, and also to adjoining owners "and all whom it may concern"; and a copy is mailed to every known one named in the notice, and a copy is posted on the land. The act declared that the decree of registration "shall bind the land and be conclusive upon and against all persons," named or not in the notice. It was said to deprive owners of property without due process of law; but the court said that the proceeding was in nature *in rem,* "and that if it did not satisfy the constitution, a judicial proceeding to clear title against all the world is hardly possible; for the very meaning of such proceeding is to get rid of unknown as well as known claims—indeed, certainly against the *unknown* may be said to be its chief end—and unknown claims can not be dealt with by any service on the claimant." The court said that the fact that the proceeding had never before been heard of made no difference as to due process; that it was *in rem* to clear title, and a valid procedure. The opinion is strong and well deserves to be read for its perspicuous presentation of the subject under discussion. The act was assailed as violative of the Fourteenth Amendment, but the court strongly asserts that ancient remedies are not impaired by that amendment. The case goes quite

far, but I suppose it is tenable under principles above stated.[31]

The Supreme Court of Ohio apparently took another view in a case[32] before it involving what is known as the "Torrens Law," a statute to quiet title and simplify registration by a short registry. It provided for filing with the recorder an application for registration, giving description of the land, naming adverse claimants, incumbrancers, occupants and adjoining occupants, and for publication in a newspaper of notice "To whom it may concern" of the filing of the application and a warning to appear before the court and make claim, which notice was served on those persons resident in the county, and mailed to others elsewhere. When registry was ordered, it cut off all adverse claim to the land. The court held the act unconstitutional as depriving persons of property without due process of law.

Forfeiture of Land for Taxes.—Upon the same principles of proceedings *quasi in rem* may be based and vindicated the West Virginia legislation providing for the sale of land as forfeited for failure to enter it for taxation, or to pay taxes actually assessed thereon, through a suit in equity with publication to all persons interested, the legislation declaring that the decree condemning the the land as forfeited and subject to sale shall bind all claimants. The legislation referred to will be found in Chapter 105 of the West Virginia Code of 1891, reenacted in Acts of 1893, page 57. It was attacked as violating the state constitution and the Fourteenth Amendment of

[31] Tyler v. Judges of Registration (Mass.), 55 N. E. 812.

[32] State v. Gilbert, 56 Ohio St. 575; People v. Simon, 176 Ill. 165. *contra.*

the federal Constitution in depriving land-owners of property without due process of law; but the attack upon the said legislation has been overruled, and the legislation held to be consistent with state and federal constitutions by the state and national Supreme Courts.[33] In both courts emphasis was placed, as going far to validate the statute procedure, upon the fact and feature of the statute that the sale to enforce the forfeiture was by a chancery suit *inter partes,* and that notice was given of the proceeding by service of process and and publication, so that the parties had opportunity to defend their rights and resist the alleged forfeiture. Justice Harlan, in delivering the opinion of the Supreme Court of the United States, laid great stress upon that feature of the case. There has been much question about the constitutionality under the Fourteenth Amendment of the provisions of the West Virginia constitution and statute forfeiting lands for failure of the owner to have them charged with taxes on the land books, it being alleged that the state constitution and statutes *ipso facto* from such non-entry forfeited the land and vested the owner's title in the state, without any judicial ascertainment of the delinquency of its owner, and that this forfeiture was a deprivation of his property without due process of law. But this contention has been met in the cases cited by the answer that under the process adopted by the state through a chancery suit for the declaration of the forfeiture and the sale of the land, the owner has his day in court to contest the fact of forfeiture and exculpate his land from it. So this

[33] State v. Sponaugle, 45 W. Va. 415, 32 S. E. 283; King v. Mullins, 171 U. S. 404.

matter has been set to rest. Both forfeiture and sale process have been held valid. Legislation in Virginia many years prior to the Fourteenth Amendment existed in repeated acts forfeiting large areas of land for the nonpayment of taxes assessed thereon, or for the failure of owners to enter it for taxation. The proceeding for the sale of such land as forfeited was not a proceeding by suit *inter partes,* but simply an *ex parte* proceeding to sell the land, without any provision for hearing the owner; indeed, it was held that he had no right to a hearing.[34] The Virginia courts in several cases[35] held that the Virginia statutes *proprio vigore,* without office found or any inquisition judicial in its nature, forfeited the land and invested the state with its title, and that such statutes were constitutional. It is true that those decisions antedated the Fourteenth Amendment, but there was in the Virginia constitution the provision that no one should be deprived of his property without due process of law. As stated in the cases of State v. Sponaugle and King v. Mullin, *supra,* such forfeiting statutes had been long and frequently resorted to by the state of Virginia as a means and ordinary process for the enforcement of payment of her taxes, and under the strong powers of a state on the subject of taxation those statutes were ancient, ordinary, usual and due process for the enforcement of her rights against delinquent taxpayers long before the coming of

[34] McClure v. Maitland, 24 W. Va. 561; McClure v. Mauperture, 29 W. Va. 633.

[35] Wild v. Serpell, 10 Grat. 405; Statts v. Board, 10 Grat. 400; Levasser v. Washburn, 11 Grat. 572; Usher v. Pride, 15 Grat. 190. See Armstrong v. Morrill, 14 Wall. 120.

the Fourteenth Amendment, and were not impugned by it.

Judgment against Corporations on Leaving Summons with Register of Deeds, though authorized by statute, is not by due process under the Fourteenth Amendment.[36]

Alimony, Decree for, without service of process inside of the state, though service be made outside of the state, is void, and not due process under the Fourteenth Amendment.[37]

Specific Performance of Contract to Convey Land may be decreed against a non-resident, without personal service of process, on mere publication of notice, and the proceeding is valid and due process. This is so upon principles fully stated above, it being a proceeding *in rem,* a suit to recover the land sometimes, and at any rate, a suit to secure title to the land within the state.[38]

Probate of Wills is an action *in rem,* and though entirely *ex parte,* and without service of process, and even without publication, is due process in such case; was so held long before the Fourteenth Amendment, and the order of probate is binding on the world.[39] It might seem that a probate sentence for or against the validity of a will forever binding anyone interested, who being absent in distant parts, never heard of the motion for probate, would be undue process; but the authorities hold that a sentence either probating or refusing to probate a will is final and conclusive upon everybody, whether adults or

[36] Pinney v. Providence Co. (Wis.), 82 N. W. 308.

[37] Elmendorf v. Elmendorf, 44 Atl. 164; Coger v. Coger, 35 S. E. 823; Bunnel v. Bunnel, 25 Fed. 214.

[38] Boswell v. Otis, 9 How. 336.

[39] Gaines v. Fuentes, 92 U. S. 21.

infants, married women or others, unless statute law otherwise provide. The authorities say that this is so, because the proceeding is one *in rem.* I cite, in addition to the authorities given above, others in the footnote.[40]

Estrays.—Statutes giving estrays to the finder are valid. The proceeding is an ancient one under the common law, and is in nature *in rem.*[41]

Judgment in one State no Lien in Another, even where process was personally served, and the judgment is one in every respect binding and constitutes a lien in the state where rendered. If it were a lien in another state, that would be to give one state jurisdiction and power over property in another, which can not be. Nor can execution issue upon the judgment in the state where rendered to run into and be levied in another state, as that would violate the fundamental rule that judicial process of one state can not have force in another, as the law and adjudication of one state can have no extra-territorial force, because that would infringe upon the sovereignty of another state. The judgment is only a simple contract debt in the second state. If it is desired to enforce that judgment in other states, there must be suit in other states on the judgment to obtain a judgment upon it, in order to create a lien or have process of execution in other states. The faith and credit given to the judgment by Article IV in another state is, that if the court of the judgment had jurisdiction, that judgment is conclusive evidence of the

[40] Schultz v. Schultz, 10 Grat. 358; Ballou v. Hudson, 13 Grat. 672; 3 Redf. on Wills, 63; Young's Will, 123 N. C. 358, 31 S. E. 626; Carpenter v. Bailey (Cal.), 60 Pac. 162.

[41] Campbell v. Evans, 45 N. Y. 356.

liability, and precludes a re-trial or re-investigation of the merits of the cause of action. Beyond this it would not be due process of law.[42]

Publication as to Unknown Claimants of land in actions to try adverse claims or quiet title, or to affect the land itself binds them, and the decree or judgment is valid, because the proceeding is *in rem*.[43]

Decree for Execution of a Deed.—If the defendant is personally before the court, a decree requiring him to execute an instrument which will pass title to land situate in another state is valid and due process. It is the deed, not the decree, that operates on the property and passes the title.[44] But it seems from the cases cited that the deed must be made by the party himself, and not by a commissioner or other agent of the court appointed by the decree to make such deed, as that would be only the decree operating beyond the state.

Service of Process Outside the State issuing it is ranked simply as publication in a newspaper, or by posting, is only in lieu of publication, has no more force than publication, and gives no right to enter personal judgment. Process can not run outside of a state, and has no mandatory force to require the defendant to attend the court.[45] But it is "due process," as several times stated above, to affect property in the state, as, for instance, a suit to en-

[42] McElmoyle v. Cohen, 13 Pet. 312; Carter v. Bennett, 6 Fla. 214.

[43] Shepherd v. Ware, 46 Minn. 174, 24 Am. St. R. 212.

[44] Watkins v. Holman, 16 Pet. 67; Wilson v. Braden, 47 W. Va. —; Dickinson v .Hoomes, 8 Grat. 410.

[45] Harkness v. Hyde, 98 U. S. 476; York v. Texas, 73 Tex. 651.

force a lien, or any *in rem* proceeding, if notice not too short; not good if too short.[46]

Garnishment in State of Debtor of a Debt due to a Resident of Another State is valid due process to take the debt from the garnishee's creditor, and protect the garnishee from an action by his creditor. It is a proceeding *in rem* in the state of garnishment, and is valid under the Fourteenth Amendment as due process, and the judgment is entitled to the same force in other states which it has in the state of garnishment, as to the debt, under Article IV, Section 1, of the federal Constitution.[47] There are some cases denying this proposition, holding that the *situs* of the debt is not in the state of the garnishee, but in the state of the other debtor, the garnishee's creditor, and therefore there can be no proceeding in the state of the residence of the garnishee that can affect the creditor of that garnishee for want of jurisdiction. I think, however, that those cases just cited hold the better doctrine. They hold that the *situs* of the debt is in the state where the garnishee owing the debt resides, and that it is there subject to garnishment in the courts of that state as property located in it. The author expressed his views in a dissenting opinion in Stewart v. Northern Company,[48] saying: "The justice in Ohio had jurisdiction and authority under the law of Ohio to render the judgment against the garnishee. This is not denied. This judgment had the effect there to protect the defendant against

[46] Roller v. Holly, 176 U. S. 398, 20 Sup. Ct. 410.

[47] Chicago, etc. Co. v. Sturm, 174 U. S. 710; King v. Cross, 175 U. S. 396, 20 Sup. Ct. 131.

[48] 45 W. Va. 734, 742, 32 S. E. 222.

a suit by Mrs. Stewart (resident in West Virginia) to make him pay the money again. Having this force in Ohio, it must have the same force in every state, under the United States Constitution, providing that 'full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state,' and the act of Congress under it that judgments in a court of one state 'shall have such faith and credit given them in every court within the United States as they have by law or usage in the courts of the state from which they are taken.' We do not go behind the Ohio judgment to see on what contract in favor of the creditor it was rendered, whether good or bad, void or not, because the only question is: Had the court jurisdiction, and did it give judgment protecting the garnishee there? 1 Greenl. Ev. §548. 'It is a question of constitutional obligation, not of state policy, whether our courts will enforce a judgment of another state court of competent jurisdiction having jurisdiction in the case. When a judgment or decree of the court of another state is sought to be enforced in this state the court in this state may inquire into the jurisdiction of the court which rendered the judgment or decree; and if it appears that such court had no jurisdiction the judgment or decree is void; but if it had jurisdiction the judgment or decree is valid and binding in this state.' Stewart v. Stewart, 27 W. Va. 167. 'The first question to be determined in regard to a judgment of another state, after jurisdictional inquiries have been satisfactorily answered, is, what is its effect in the state whence it was taken? The effect which it has there is precisely the effect which must be accorded to it in every other state.

It must not be given any greater effect than it had in the state wherein it was rendered. If the judgment appear on its face to be harsh and erroneous, it must be received and enforced, irrespective of its harshness. The pleas which might be made to it at home, and those only, can be made to it in any other part of the Union.' 2 Freem. Judgm. §575.

The law is that it is not the domicile of the owner of the debt garnished that tests the place of jurisdiction for garnishment, but the question whether the court had control over the garnished debtor within its territory. Mooney v. Manufacturing Company, 34 U. S. App. 582; 18 C. C. A. 421; 72 Fed. 32; Douglass v. Insurance Co., 138 N. Y. 209; 33 N. E. 938. Mrs. Stewart could sue the company in Ohio, and therefore it could be garnished there. 'Foreign corporations are subject to the process of garnishment in all cases in which an original action may be commenced against them in the courts of this state to recover the debt in respect to which the garnishment process is served. . . . A foreign corporation doing business within the state may generally be made a garnishee in that state when, by the laws of the state, service of process may be properly made upon it therein; when according to the jurisdictional rule, the debt is payable within the state, or the corporation has within its control property belonging to the principal defendant.' 2 Shinn, Attachm. §493. 'When there is a seizure of the defendant's property at the commencement of the action, or, in garnishment, what is equivalent to seizure at that time, namely, service of process upon the garnishee, accompanied in both cases by publication or other form of sub-

stituted service against a non-resident defendant, it is well settled that such process is due process of law in attachment suits, and that a judgment so rendered will divest the defendant of his title to such property, and will protect the garnishee from the danger of double payment.'" Reno, Non-Res. §241. See Molyneux v. Seymour, 76 Am. D. 671.

2 Black, Judgment, §852, says: "The judgment of a foreign court of competent jurisdiction, in a proceeding in the nature of a garnishment, is binding and conclusive and affords a complete protection to the garnishee, and the money paid under it can not be recovered back by the original owner of the debt in any action in another country." Garnishment is a proceeding *in rem*, binding everywhere (2 Shinn, Attach. §486; 76 Am. Dec. 671; 1 Greenl. Ev. §543); at least so far as the property garnished and its owner are concerned. "The liability of property belonging to non-residents to be attached and sold under legal process is determined by the law of the state in which the property is actually situated, and from whose courts the process issues, and is not determined by the law of the state in which the owner resides. Hence, in case of conflict between the laws of these two state, the law of the former governs." Reno, Non-Res. §148. "Where, however, the garnishee is a resident of the state, the fact that the principal debtor is a non-resident will not affect the validity of the garnishment proceedings, because attachments are permitted against non-resident debtors. And the fact that the principal defendant is served by publication only has no effect upon the jurisdiction of the court, when the property or debt is within the power of the

court; that is to say, where the property is within the jurisdiction of the court, or the debt is payable therein." 2 Shinn, Attach. §861.

The majority of the court in the case of Stewart v. Northern Assurance Company, just cited, held that the contract of Mrs. Stewart was void under the laws of West Virginia because she was a married woman, and therefore it could not be enforced against her by garnishment of her debtor in Ohio. As to this feature the author said: "This is no matter. The question is the force of the Ohio judgment in Ohio. Rev. Stat. of Ohio, §§4996, 5319, authorize judgments on married women's contracts. Thus, the judgment is not void there. . . In West Va., in Black v. Smith, 13 W. Va., 780, held that 'when a court of law in the state of Maryland, having jurisdiction of the subject and person of the citizen, renders judgment in a cause therein pending against such citizen for money, the validity of such judgment can not be questioned in the courts of this state; nor will the courts of this state look into the transaction upon which the Maryland judgment is founded, in order to ascertain if that judgment ought not to have been rendered.' Johnson, President, in Stewart v. Stewart, 27 W. Va. 173, said: 'But it is not on the ground that such suits have been maintained in many states that we would enforce a decree for such cause in our own courts, nor would we sustain it because it agreed with our policy, nor refuse to enforce it here, because it is hostile to our policy. The reason why we would enforce a decree rendered by a court of competent jurisdiction in another state is the fact that

the Constitution of the United States requires us to do so.' "

The author went on, in that opinion, to show that mere personal disability would not affect the validity of the judgment, unless it rendered the judgment void in the state where it was rendered, citing 2 Black, Judg. §888, and contended that the validity or invalidity of the judgment in Ohio was the true test.

"Garnishment of a resident debtor to reach a debt due to a non-resident defendant who has no property subject to the jurisdiction of the court, does not deprive him of property without due process of law."[49]

Non-Resident Share-Holders.—It has been held that in a suit in a state court to ascertain and declare ownership among conflicting claimants to shares in the capital stock of a corporation, and to remove cloud over the title to such shares, publication to non-resident claimants is sufficient, and due process, as the proceeding is one *in rem*.[50]

Criminal Process.—Presence of Accused.—Principles of the common law, and most of the state constitutions and and statutes, imperatively require, as an initial step, before any further one in the process of conviction of felony, that the accused shall be personally present to answer the indictment. He can not do so by counsel. He must be so present at every step when anything material to his interests is done in his case down to and including final judgment. In any case not felony he may be tried upon such service of process as the state allows, and judgment may be rendered against him for pecuniary penalty,

[49] King v. Cross, 175 U. S. 396, 20 Sup. Ct. 131.
[50] Jellenix v. Huron Copper Co. 177 U. S. 1.

though he be not personally present during trial or at the judgment; but if any corporal punishment is inflicted he must be present at the judgment, though his presence during the trial may be dispensed with, at least in the Virginias and some other jurisdictions—likely everywhere, in the absence of a statute. If not present at the verdict he is brought in to receive judgment by a writ of *capias ad audiendum judicium*. There can be no judgment for even pecuniary penalty on publication, without personal service of process, to be good in the state where rendered or elsewhere.[51] Of course, any judgment for felony or for misdemeanor imposing corporal punishment without the presence of the accused would deprive him of liberty without due process of law, because the proceeding would be undue and unusual, departing from the accustomed procedure in such cases, and would violate the Fourteenth Amendment. So would a judgment for a pecuniary fine without personal service to answer the charge.

Presence of Accused, no matter what the grade of offense, though necessary under circumstances just stated in the original trial court, is not usual and is not required in an appellate court when the sentence or judgment against him is affirmed, in order to make that affirmance valid, due process. This is so, because the case is not being tried upon the facts upon the party's deliverance before a jury of his country, as that has already taken place. The ap-

[51] 1 Bishop, Crim. Proceed. Sec. 265; Wharton, Crim. Pl. & Prac. Sec. 540; Warren v. State, 19 Ark. 214; 68 Am. Dec. 214 and full note; State v. Campbell, 42 W. Va. 246, 24 S. E. 875; Barclay v. Barclay, 184 Ill. 471; Moundsville v. Fountain, 27 W. Va. 182.

pellate court merely affirms the judgment already rendered, and does not render a new judgment.[52]

Municipal Offense is triable by the mayor of the city or town without a jury, and is due process. A jury has never been used in such cases. The Fourteenth Amendment does not change this.[53]

Limiting Number of New Trials by State Statute is not in violation of the Fourteenth Amendment. It is mere state regulation of procedure in its courts, which is allowed to it.[54]

Governor Fixing Day of Execution of Death Sentence, pursuant to a state statute, does not take away life without due process, contrary to the Fourteenth Amendment. It is not the improper exercise by the executive of judicial power. The court has rendered the judgment, the law has adjudicated upon the rights of the state and the accused, the court function has been performed, and the fixing of a day for execution is simply ministerial action.[55]

State Constitution Divesting Husband's Rights.—A state constitution or statute can not divest a husband of his marital rights vested in him in his wife's property before the adoption of such constitution or statute, because that would be to deprive him of his actual property without due process of law; but such constitution or statute may provide that the wife's future-acquired property shall be her separate estate, free from the control or debts of her husband, although the marriage took place before

[52] Schwab v. Bergren, 143 U. S. 442.

[53] Natal v. Louisiana, 139 U. S. 621; Thesen v. McDavid, 16 So. 321, 34 Fla. 440; Moundsville v. Fountain, 27 W. Va. 182.

[54] Louisville, etc. Co. v. Woodson, 134 U. S. 614.

[55] Holden v. Minnesota, 137 U. S. 483.

the adoption of such constitution or statute; and this is so, because at that date the husband had no vested property.[56]

Statutes of Limitation.—The right of the state to pass statutes limiting the time within which actions and suits shall be brought for the recovery of property, debt or damage is power which for centuries has been exercised by the legislature of the states and by the British Parliament before American independence, and is therefore due and ordinary process of law, cutting off rights, which but for such statutes would continue to exist. Clearly, therefore, the Fourteenth Amendment does not impair this right. Suppose, however, the legislature shall repeal a statute of limitations as to any action, or lengthen its period, and thus cut off defenses good before, under the statute of limitations. Does such legislation violate the Fourteenth Amendment by depriving the person of property without due process of law? The West Virginia Supreme Court held[57] that "where title to property has vested under the statute of limitations no act can, by extending the statute or reviving the remedy, impair such title. It would be unconstitutional, because depriving one of property without due process of law; but where the demand is on contract, or any class of actions where the statute merely gives a defense, and does not vest property, there is no vested right to such mere defense, and the legislature may, by repeal of the statute or otherwise, revive the action, and deprive one of such defense." The distinction there made is, I think, well founded, though, as

[56] Allen v. Hanks, 136 U. S. 300.

[57] McEldowney v. Wyatt, 44 W. Va. 711, 30 S. E. 239.

stated in the opinion, perhaps the preponderance of authority does not make that distinction, but goes to the proposition that whether it is a case where title to property has vested under the statute or is a mere defense against action on contract or tort which has matured, that defense can not thus be taken away. The United States Supreme Court, however, makes such distinction, holding that a repeal of the statute cutting off a defense against a debt does not deprive of property contrary to the Fourteenth Amendment.[58]

The opinion by Justice Miller says: "By the long and undisturbed possession of tangible property, real or personal, one may acquire a title to it, or ownership superior in law to that of another, who may be able to prove an antecedent and, at one time, paramount title. The superior or antecedent title has been lost by the laches of the person holding it, in failing within a reasonable time to assert it effectively; as, by resuming the possession to which he was entitled, or asserting his right by suit. What the primary owner has lost by laches the other party has gained by continued possession without question of his right. This is the foundation of the doctrine of *prescription*, a doctrine which, in the English law, is mainly applied to incorporeal hereditaments, but which, in the Roman law, and the codes founded on it, is applied to property of all kinds. . . .

Possession has always been a means of acquiring property. It was the earliest mode recognized by mankind of the *appropriation* of anything tangible by one person

[58]Campbell v. Holt, 115 U. S. 620.

to his own use, to the exclusion of others, and legislators and publicists have always acknowledged its efficacy in confirming or creating title. The English and American statutes of limitation have in many cases the same effect, and if there is any conflict of decision on the subject, the weight of authority is in favor of the proposition that where one has had peaceable, undisturbed, open possession of real or personal property, with an assertion of ownership, for the period which, under the law, would bar an action for its recovery by the real owner, the former has acquired a good title—a title superior to that of the latter, whose neglect to avail himself of his legal right has lost him his title. It may, therefore, very well be that, in an action to recover real or personal property, where the question is as to the removal of the bar of the statute by legislative act passed after the bar has become perfect, such act deprives the party of his property without due process. The reason is that by the law in existence before the repealing act, the property had vested in the defendant. . . But we are of the opinion that to remove the bar which statutes of limitation enable a debtor to interpose to prevent the payment of his debt stands on very different ground."

Suppose, next, that the legislature shortens the period of limitation, and thus destroys a right to recover property, or debt on contract, or damages for a tort, which right was alive at the date of that act. The right to recover in any one of the cases is a vested right of property. The legislature can pass retrospective acts, and, it may be said, can even destroy vested property, in the absence of

hindrance by constitutional restraint;[59] but there is the state constitution and the federal prohibiting any act to impair a contract or to take away property without due process of law. The Fourteenth Amendment does the latter, and both federal and state constitutions prohibit the impairment of a contract by law. Such an act shortening the period of limitation active upon existing rights of action, if construed to be retroactive, or so in express words, is a violation of the state constitutions and the Fourteenth Amendment, unless it gives a reasonable time within which to bring suit upon such existing causes of action for property, for debt or other contract, or for damages for torts. The Supreme Court holds that consistently with the Fourteenth Amendment the state legislature may prescribe a limitation for an action where none was before, or shorten the time within which suits on existing rights of action must be brought, "provided a reasonable time, taking all the circumstances into consideration, be given by the new law for the commencement of suit before the bar takes effect."[60]

Several former cases in the Supreme Court are there cited. If the act does give such time for bringing suit, it does not impair the obligation of a contract or deprive of property without due process. Whether the time allowed for suit before the bar of the new law applies is reasonable, depends on the circumstances. "No one rule can be laid down for determining as to all cases alike, whether the time allowed was or was not reasonable; that

[59] Sedgwick, Stat. & Const. L. 166.

[60] Wheeler v. Jackson, 137 U. S. 245; Terry v. Anderson, 95 U. S. 628; Saranac L. Co. v. Roberts, 177 U. S. 318; 20 Sup. Ct. 645.

fact must depend upon the circumstances in each case."[61] It has been held that several months between the passage and the going into effect of the new law will not do; that the time between passage and taking effect of the act can not be counted.[62]

Validating Void Contracts.—It seems that a statute validating an antecedent void contract is not open to the imputation that it impairs the obligation of a contract, contrary to the federal or state constitution, or that it deprives one of property without due process of law. An act confirming previous loans by foreign corporations was held not unconstitutional.[63]

A void contract of a municipal corporation can be validated by the legislature.[64] But how if it is a private contract? The legislature can not make a contract binding on me which is not so in law. A legislature can do almost what it pleases with a municipal corporation of the state; it can make it pay debts which otherwise would not bind it, as the legislature can pay a debt of the state which would not bind it, without such validation. Can it so act on private corporations? I doubt. But if it can it would be on the theory that the corporation had received its franchise from the state. It can not be done.[65]

Dissolving Corporations by Judgment of State Court where the corporation had opportunity for full defense was held not to deprive the corporation of franchise or property

[61] Terry v. Anderson, 95 U. S. 628.
[62] Gilbert v. Ackerman, 159 N. Y. 118, 45 L. R. A. 118.
[63] Gross v. U. S. Mortg. Co. 108 U. S. 477.
[64] Steel Co. v. Erskine, 98 Fed. (C. C. A.), 215.
[65] Farmers' Bank v. Gunnel, 26 Grat. 131.

without due process of law.[66] The power of courts, for non-user or mis-user of franchise by a corporation, to dissolve it was well established long before the Fourteenth Amendment.

Private Mill.—An act granting right to a man to build a mill on his own land, paying damages to owners of lands flooded thereby, was held not to deprive such owners of property without due process.[67]

Act Regulating Contest for Election held not to take away life, liberty or property without due process of law.[68]

Jury Trial in State Court is not a "privilege or immunity" of national citizenship protected under the Fourteenth Amendment.[69]

Disbarring Attorney.—This is not a criminal case giving a right to a trial by jury, but is a proceeding to protect the court from official ministration of persons unfit to practice as attorneys, and it does not invade the constitutional provision that no person shall be deprived of life, liberty or property without due process; but the proceeding itself (by rule to show cause why the attorney should not be disbarred) is itself due process, because long used as usual procedure in such case.[70]

Board to Assess Railroad Taxes.—Such assessment need not be made by a court, but may be made by officers of the state or a board of persons constituted therefor expressly by an act of the legislature. This process is due process in such case, though the act does not require notice to

[66] Chicago Life, etc. Co. v. Needles, 113 U. S. 574.
[67] Head v. Amoskeag, 113 U. S. 9.
[68] Kennard v. Louisiana, 92 U. S. 480.
[69] Walker v. Sauvinet, 92 U. S. 90; Chappell, etc., Co. v. Sulphur Mines Co., 172 U. S. 474.
[70] *Ex parte* Wall. 107 U. S. 265.

the railroad company before the assessment becomes final, as the statute fixes the time and place of the meeting of the board; nor though the act does not require the board to grant a hearing for correction of errors, as by the construction of the act by the state Supreme Court a right to hearing is given; nor for want of notice to be heard after determination by the board, as re-hearing is not necessary.[71]

Condemnation of Property for Public Use.—The Fourteenth Amendment applies to proceedings for the condemnation of property for public use instituted after its adoption, though under a statute passed before that amendment.[72]

Act Prescribing Additional Punishment on Second Conviction.—In almost all the states we find statutes leveled against habitual criminals imposing additional punishment on those convicted of crime more than once. Such legislation has been held not to deny the equal protection of the law guaranteed by the Fourteenth Amendment.[73]

Imprisonment of Inebriates in Sanatarium, by virtue of a statute for their treatment and reformation, where the order of confinement is in the absence of the party and without notice to him, is not due process of law, such commitment being final and not temporary only to restrain the person during period of danger. And it makes no difference that the statute reserves the right to review the order of commitment by *habeas corpus,* this not being due proc-

[71] Pittsburg, etc. Co. v. Backus, 154 U. S. 421, 438.
[72] Kaukana, etc. v. Green Bay, 142 U. S. 254.
[73] McDonold v. The Commonwealth, 173 Mass. 322.

ess, as that term means process before final judgment. It is not valid as a temporary commitment, as no investigation after such commitment to ascertain the party's condition is directed by statute. It was held that there might be temporary, summary commitment in the case of a dangerous or incompetent person, as in the case of alleged criminals held in confinement until they are tried; and the constitutional provision for due process does not exclude proper and reasonable police regulations as to temporary confinement until trial.[74]

Cigarettes, Sale of.—A city ordinance may require license to sell cigarettes and prohibit their sale within two hundred yards of a schoolhouse. Such an ordinance does not deprive of liberty without due process of law.[75]

Ticket Brokers. A statute prohibited the sale of passage tickets by anyone but common carriers, and it was held violative of the Fourteenth Amendment under the head of "liberty," because it took away liberty of contract, liberty to sell a lawful article. Perhaps it was contrary to the equal protection clause also, because it allowed common carriers only to sell such tickets.[76]

Struck Jury.—In New Jersey the law provides for the ordinary jury and also a special jury formed in another way, and under the ordinary jury the prisoner has twenty peremptory challenges, but only five under the struck jury. A party sentenced to be hanged for murder claimed that his life was to be taken without due process of law,

[74] People v. St. Saviour Sanitarium, 34 App. Div. 363. See Evans v. Johnson, 23 L. R. A. 737, 39 W. Va. 299, 19 S. E. 623.

[75] Gundling v. Chicago, 176 Ill. 340, 177 U. S. 183, 20 Sup. Ct. 633.

[76] People v. Warden, 157 N. Y. 116, 43 L. R. A. 264.

contrary to the Fourteenth Amendment, he having been tried by a struck jury; but the Supreme Court of the United States held that the highest state court had decided that the statute for such a struck jury was valid under the state constitution, which fact foreclosed that question in the national Supreme Court.[77] The court said: "The state has full control over the procedure in its courts, both in civil and criminal cases, subject only to the qualification that such procedure must not work a denial of fundamental rights, or conflict with specific and applicable provision of the federal Constitution. *Ex parte* Reggel, 114 U. S. 642; Iowa, etc., v. Iowa, 160 U. S. 389; Chicago, B. & Q. Co. v. Chicago, 166 U. S. 226. The Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two states separated only by an imaginary line. On one side of the line there may be a right of trial by jury, and on the other side no such right. Missouri v. Lewis, 101 U. S. 22, 31." The conviction was affirmed.

Error in Trial.—Life Sentence.—It is well settled that a regular trial, criminal or civil, in the due and orderly course of state law, is due process under the Fourteenth Amendment, even though there be error in the proceeding, which would reverse it on appeal to a state court, provided the judgment be not utterly void. Hence a failure to charge a jury that it could find the prisoner guilty

[77]Brown v. New Jersey, 175 U. S. 172; Leeper v. Texas, 139 U. S. 463.

of murder either in the first or second degree was held no violation of the Fourteenth Amendment.[78]

Prima Facie and Conclusive Evidence of Guilt.—Statutes making certain evidence or facts conclusive evidence of guilt of crime are held to violate the constitutional demand for due process of law before life or liberty can be taken; but this is not so if the statutes make such evidence of facts only *prima facie* evidence of guilt. In the one case the party may repel before his country the force of the state's case, in the other his fate is sealed, and he can not answer such facts or evidence.[79]

Curative Act of Void Criminal Proceedings is a violation of the Fourteenth Amendment as depriving of life, liberty or property without due process of law.[80] A void thing can not be made whole.

Insane Convict.—A state statute authorizing a sheriff to summon a jury to try whether a convict became sane after death sentence was held not contrary to the Fourteenth Amendment. The Supreme Court said that the common law did not give a trial before a court and jury in such a case, and that as the highest state court had held the statute to be valid state procedure, so would the United States Supreme Court.[81]

Mechanic's Liens.—There is no doubt about the constitutionality of the statutes found in almost every state

[78] Davis v. Texas, 139 U. S. 651; Hallinger v. Davis, 146 U. S. 314; Lambert Barrett, 159 U. S. 660; Laidley v. Land Co. 159 U. S. 103.

[79] State v. Bingham, 42 W. Va. 234, 24 S. E. 883; Wooten v. State, 24 Fla. 335, 1 L. R. A. 819; Castillo v. McConnico, 168 U. S. 674; Meyer v. Berlandi, 39 Minn. 438, 12 Am. St. R. 663.

[80] State v. Doherty, 60 Me. 504.

[81] Nobles v. Georgia, 168 U. S. 398.

of the Union giving mechanics and materialmen liens for building and material furnished under contract with the owner of the land; but how as to statutes giving subcontractors, laborers and others building, laboring or furnishing material to the contractor under contract with him, but without contract with the owner? Can that owner's property be charged with a lien and taken from him when he made no contract with the subcontractor? Does this deprive him of liberty and property without due process of law in taking away his right of contract, in refusing him right to contract or not to contract as he pleases, and the right, if he chooses not to contract, and has not contracted, to be exempt from the imposition of a liability as if he had contracted, and in rendering his property liable for such burden? Some cases hold such statutes void for these reasons, and also because they are made, not to subserve general public weal and want, but only for private ends, and thus denying equal protection of the law. The authorities, however, differ. Jones on Liens[82] says that the constitutionality of those statutes is well established, and cites many cases, their theory being that the statutes annex the lien as an incident to the contract between the land-owner and the main contractor, that contract being evidence of an authority of the contractor to charge the owner's property with liabilities incurred by such contractor in performing the contract. This does not seem to be a conclusive reason. It would seem that a stronger reason, if there is any good reason, is that when he contracts the owner knows, or is held to know, that the law allows a lien to the subcontractor, and therefore the

[82] Vol. 2, Sec. 1304.

owner contracts with an eye to that law. But those cases hold the land liable to the subcontractor without regard to the state of accounts between the owner and the original contractor, even if the owner's debt has been paid. The rule seems questionable. Some cases hold such statutes void.[83]

No Jury in Equity.—How comes it that the invariable practice in chancery is for the chancellor to decide matters of fact, whereas matters of the very same nature are tried in common law courts by a jury, and must be so tried under the Constitution? Is this practice in chancery due process of law? It would not be so in common law cases, but it is in equity. It has been frequently above stated that due process of law as required in the Fourteenth Amendment is not a new departure, not a demand for anything new, but that such law and procedure as were usual, established, due and accustomed and applicable to all alike who were similarly circumstanced when that amendment came, is still due process under it. For centuries before the amendment equity jurisprudence and chancery courts, as they came from England, had existed, and those courts tried matters of fact without juries, the chancellor passing on both fact and law, unlike common law courts. Chancery courts knew no jury, except in a few special cases of issues out of chancery sometimes ordered to settle doubtful questions of fact merely to "satisfy the conscience of the chancellor," not that the party had absolute right to demand it. That is a different matter from the general jury right. Hence, there is no want of due proc-

[83] Spry L. Co. v. Sault, etc. Bank, 77 Mich. 199, 18 Am. St. R. 396; Palmer & Crawford v. Crawford, 55 Ohio St. 423.

ess in cases where, before a constitution providing for jury trial, equity already had jurisdiction over the subject-matter, as in cases for restraint and abatement of nuisances, partition, fraud, fraudulent conveyance, mistake, cancellation of instruments, specific performance, and many other cases.[84] "Where already, at the adoption of a constitution, equity exercised jurisdiction in certain matters, the clause of the Constitution giving jury trial does not relate to such matters, or deprive equity of jurisdiction therein to act without jury."[85] But these cases show that where, at the adoption of a constitution giving jury trial in common law cases, a matter was of such nature as demanded a common law action with jury trial, the legislature can not, by giving equity jurisdiction over it, deprive a party of jury trial. The act giving such jurisdiction in equity would be void and inoperative if the party objected. A late case[86] sustains the proposition that where the controversy is purely of a legal nature, there can not be jurisdiction in equity depriving a suitor of a jury—even a statute giving such equity jurisdiction in such case would be void. The case just cited holds that as there was a legal remedy for recovery of land, equity could not assume jurisdiction, and thus deny a jury trial. This doctrine is found in Loving v. Norfolk & Western

[84] Mugler v. Kansas, 123 U. S. 623; Merrill v. Bowlen, 20 R. I. 226; Blanchard v. Rains, 20 Fla. 467; State v. Saunders, 66 N. H. 39.

[85] Cecil v. Clark, 44 W. Va. 660, 30 S. E. 216; Davis v. Settle, 43 W. Va. 19, 26 S. E. 557, 563; Barlow v. Daniels, 25 W. Va. 512; Eilenbeker v. Plymouth Co. 134 U. S. 31; *In re* Debs, 158 U. S. 564, 594; Pillow v. Improv. Co. 23 S. E. 32, 92 Va. 144; State v. Doherty, 16 Wash. 382; Barclay v. Barclay, 184 Ill. 471.

[86] Black v. Jackson, 177 U. S. 349, 20 Sup. Ct. 648.

Railroad Company,[87] holding that a statute providing for the trial of an appeal from a justice involving a purely common law matter, by a jury of six, when the constitution simply calls for a jury in trials at common law, was unconstitutional and void. The case required twelve jurors under the Constitution.

Dismissal of Criminal Appeal by reason of escape of accused under an order that it be dismissed, unless he appear and surrender himself to the law, is not without due process under the Fourteenth Amendment.[88]

Irrigation of Arid Land.—Water used for this purpose is used for a public purpose, though all persons do not have a right to use it, if each land-owner has equal right to use it on the same terms as others; and therefore a statute organizing districts for irrigation and directing assessment on lands to pay cost of irrigation does not deprive owners of their property without due process. It is justified under the taxing power.[89]

Tax Penalty on Certain Corporations.—An act imposing a penalty of fifty percent increase upon express, telegraph, telephone and sleeping-car companies for nonpayment of taxes does not deprive them of property without due process of law.[90]

Deposit of Money as Condition of Defense against Tax Deeds.—An act requiring this was held to be not due process.[91]

[87] 35 S. E. 962, 47 W. Va. —.
[88] Allen v. State, 166 U. S. 138.
[89] Fallbrook v. Bradley, 164 U. S. 112.
[90] Western Union v. State, 165 U. S. 304.
[91] Bennett v. Davis, 37 Atl. 864; Eustis v. City of Henrietta, 39 S. W. 567.

Conviction of Minor Offense Under Indictment for Greater.—If a state court holds that a conviction of a minor offense, as assault and battery, may be had under an indictment for a greater offense, as for murder, there is no want of due process of law under the Fourteenth Amendment.[92]

Condition Precedent to Employment.—A statute prohibiting a railroad company from requiring, from applicants for employment, as a condition precedent thereto, that they shall waive damages for personal injury, and declaring that such agreements of waiver should be void, was held to violate the Fourteenth Amendment in depriving the parties of liberty of contract.[93]

Public Easements.—"The Fourteenth Amendment does not override public right existing in the form of servitudes or easements which are held by the state courts to be valid under its constitutions and laws." [94] The taking of land for a levee without compensation was held in the case cited to be justified under the public easement right, and was due process. The amendment did not destroy this antecedent right..

Unanimous Verdict.—The state may authorize a verdict on less than a unanimous vote.[95] The authorities on the point conflict.[96] I should have no doubt that if the state were, by its constitution, to allow a verdict on less

[92] Moore v. Missouri, 159 U. S. 673.

[93] Shaver v. Pa. Company, 71 Fed. 931.

[94] Eldridge v. Trezevant, 160 U. S. 452.

[95] Mackey v. Ensperger, 39 Pac. 541, 11 Utah 154; Hess v. White, 24 L. R. A. 277.

[96] Jacksonville, etc. v. Adams, 33 Fla. 608, 24 L. R. A. 272, and note.

than unanimity, it would be good, as relating to mere procedure in state courts, which is a matter left to the states, and because decisions of the U. S. Supreme Court hold that a state may authorize a jury to be constituted of less than twelve; but where a state constitution simply gives a jury trial, I doubt the power of a legislature to authorize a verdict except by the concurrence of all the jurors. That is what a common law jury trial means, the verdict being an essential part of the trial, the fruition of it. It is implied in the grant of "trial by jury," a verdict such as common law demands. Where the state constitution simply calls for a jury trial, a denial of unanimity would not be due process under either constitution.[97] But as Walker v. Sauvinet, 92 U. S. 90, holds that the Fourteenth Amendment confers no jury right in a state court, the state law on the subject of unanimity governs.

Denial of Criminal Appeal.—A state may give or deny it, or give it on such terms as it chooses, as it pertains to mere procedure. It is no part of a trial and not essential to due process of law under the Fourteenth Amendment.[98]

Form of Indictment.—The state may adopt such form as it chooses. It pertains to mere procedure. All that the amendment calls for is fair trial without regard to form of procedure. The state may dispense even with indictment, and proceed on an information, without the intervention of a grand jury, even in a murder case, as Hur-

[97] American Pub. Co. v. Fisher, 166 U. S. 464; Loving v. R. R. Co. 35 S. E. 962; 47 W. Va. —.

[98] Andrews v. Swartz, 156 U. S. 272; McKane v. Durston, 153 U. S. 684.

tado v. California[99] and Bolln v. Nebraska[100] clearly show. The indictment need not state the degree of murder. It is for the state court to say whether the indictment is good, whether the offense with which the party is charged is one for which there can be a conviction under the indictment, and whether a minor degree of offense can be found under the indictment.[101]

Shooting Dogs by Policemen.—A city ordinance authorizing the shooting of unmuzzled dogs, they being property, takes away property without due process of law according to Lynn v. State;[102] but Jenkins v. Ballentine[103] is *contra*. The point is questionable.[104] The power of the city to require muzzling would seem to be due police action, and the destruction of the animal for a violation of the ordinance would likely be justifiable on the ground of public nuisance and danger.

Carrying Weapons.—State law forbidding it, and authorizing arrest without warrant for its violation, seems not to deny the privileges and immunities of the citizens of the United States contrary to the Fourteenth Amendment.[105]

Railroad in Street, Liability of City to Lot-Owner.—The city of Richmond gave leave to a railroad company to occupy a street with its road, and an owner of a lot sued the city for consequential damages. The railroad was not

[99] 110 U. S. 516. See Brown v. N. Jersey, 175 U. S. 172.

[100] 176 U. S. 83, 20 Sup. Ct. 287; Fitzpatrick v. U. S. 178 U. S. 304.

[101] Bergeman v. Backer, 157 U. S. 655; Moore v. Missouri, 159 U. S. 673.

[102] 25 S. W. 779.

[103] 8 Utah, 245.

[104] Tiedman, Police Power, Sec. 141a.

[105] Miller v. Texas, 153 U. S. 535.

in front of the owner's lot; but it was claimed that its construction in the street near to the lot resulted in damage. It was claimed that property was taken without due process, contrary to the Fourteenth Amendment. The Virginia courts having held that where there is no actual taking of property, but merely consequential damage, no action lies, the plaintiff was held not entitled to recover, because there was no taking such as would give damages, no deprivation of property.[106] It seems from the case that the city would not be liable anyhow, for the reason that its action was governmental action.

Judge Must Be Authorized.—To make a valid judgment or decree, the presiding judge must be a judge either *de jure* or *de facto.* If he be merely *de facto* judge, though not *de jure,* his judgment is due process and valid; but if he is judge neither *de facto* nor *de jure* he has neither actual authority, nor color of authority, but is what is called a mere usurper, however pure his intentions may be. His judgment will not be due process, but what is termed a judgment *coram non judice,* before no judge, and is void.[107] The opinion by Judge Dent in State v. Cross, just cited, fully discusses the validity of judicial proceedings before a judge *de facto.*

Unsigned Recognizance.—An act dispensing with the signature of recognizances in open court held not to violate the Fourteenth Amendment in its provision requiring due process of law.[108]

[106] Meyer v. Richmond, 172 U. S. 82.

[107] Charles v. City, 98 Fed. 166; Griffin v. Cunningham, 20 Grat. 31, 42; *Ex parte* Ward, 173 U. S. 452; State v. Cross, 44 W. Va. 315; Norton v. Shelby County, 118 U. S. 425, 6 Sup. Ct. 1121.

[108] McNamara v. People, 55 N. E. 625.

Sale of Fish in Section of City.—An act or ordinance prohibiting the sale of fish, buttter or other provisions in a section of a city where dry goods, clothing or drugs are sold, was held to contravene the Fourteenth Amendment.[109]

Bribery in Election.—An act prohibiting bribery in elections and providing for the ousting from office of a successful candidate guilty of a violation of the act was held not to violate the requirement of due process of law.[110]

Changes in Rules of Evidence.—It is clear law that a state may uncontrollably declare what shall be evidence in its courts, and may change the law and rules of evidence, and they will operate on existing contracts, if its action relate only to evidence, without violating the contract clause of the Constitution, although consequentially this may render some contracts incapable of enforcement. Such laws savor of the remedy and procedure, and are within the power of the states, as a general rule.[111] By a parity of reasoning the same principle applies under the Fourteenth Amendment. It was not designed to deprive the states of its wonted and antecedent powers touching the law and rules of evidence in its courts deemed proper by it in the administration of justice. Such changes in the law of evidence do not destroy vested property without due process. There is no vested right in existing rules of evidence.

Change of Remedy.—A state may mould and formulate its legal remedies for the administration of justice in its

[109] City v. Netcher (Ill.), 55 N. E. 707.

[110] State v. Town (Mo.), 54 S. W. 552.

[111] Thompson v. Missouri, 171 U. S. 380; Hopt v. Utah, 110 U. S. 574; Mason v. Haile, 12 Wheat. 370.

courts, may make new remedies, or change and modify existing remedies for the enforcement of existing or future contracts, or for the vindication of property or personal rights, without violating the contract clause of the Constitution or the Fourteenth Amendment. A party has no vested right in existing remedies. So he has a fair and efficient remedy at the hands of the state when he calls upon it for relief through its courts he has no right to complain. No matter as to its form or name. The state has a right to say by what process or procedure its courts shall go, and by what means or vehicles its laws shall be administered to those who enter its forums.[112] But as it is settled that the state can not, by repeal or destruction of a remedy, take away all remedy existing at the date of a contract for its enforcement, so it can not, without violating the due process clause of the Fourteenth Amendment, take away all remedy to vindicate life, liberty and property, by repeal of existing laws of remedy or otherwise, and leave no remedy to the suitor, or rather, person. In making such changes of remedy the state must not take from existing contracts or property rights anything annexed to the old remedy essential to the full and complete enforcement of the contract or property right. The authorities upon this subject are many and nice and complicated. It does not comport with the purpose of this work to enter into their various *minutiae,* details and lines of distinction. In an early case[113] Chief Justice

[112] Railroad v. Hecht, 95 U. S. 168; Tennessee v. Sneed, 96 U. S. 69; Brown v. New Jersey, 175 N. S. 172; Leeper v. Texas, 139 U. S. 463; Peninsular Co. v. Union Co. 100 Wis. 488.

[113] Sturgiss v. Crownshields, 4 Wheat. 200.

Marshall left the door of state power, in this matter, as to contracts, too wide open by the language, "The distinction between the obligation of a contract and the remedy given by the legislature to enforce that obligation has been taken at the bar, and exists in the nature of things. Without impairing the obligation of the contract, the remedy may certainly be modified, as the wisdom of the nation shall direct. Confinement of the debtor may be a punishment for not performing his contract, or may be allowed as a means of inducing him to perform it. But the state may refuse to inflict this punishment, or may withhold this means, and leave the contract in full force. Imprisonment is no part of the contract, and simply to release the prisoner does not impair its obligation." Later cases qualify and limit this *obiter*.[114]

Additional Remedy may be Given as to Existing Contracts or other rights of action, increasing the efficiency of legal redress, without just ground of complaint by the person affected.[115]

Forms of Procedure.— The due process clause of the Fourteenth Amendment does not affect or control what are the mere forms of procedure in state courts or in their practice, and its requirement of due process is fully met and satisfied, provided that in the proceeding, no matter about its form, by rule or otherwise, the person condemned has had sufficient notice and adequate opportunity to de-

[114] Mason v. Haile, 12 Wheat. 379; Bronson v. Kinsie, 1 How. 315; McCracken v. Hayward, 2 How. 608; Barings v. Dabney, 19 Wall. 1; Edwards v. Kearzy, 96 U. S. 595; Walker v. Whitehead, 16 Wall. 314; Backus v. Fort Street Co., 169 U. S. 557.

[115] Danville v. Pace, 25 Grat. 1; Hope v. Johnson, 2 Yerg. (Tenn.), 123.

fend.[116] Forms of proceeding in state courts are not controlled by the Fourteenth Amendment. This applies to civil and criminal cases.[117] Hence, the taking of a case from a jury and its decision by a court pursuant to a statute has been held not to be a violation of the Fourteenth Amendment.[118] This would surely be good by way of demurrer to evidence, as that was a settled practice before the amendment; so perhaps the direction of a verdict would be lawful as tantamount to a demurrer to evidence.

Future Contract and Property Rights.—However far as to efficacy and efficiency for the enforcement of contract or property rights a new law may detract from or lessen the old, future contracts, and future-acquired property rights must submit to the new law, and the law existing at their birth constitutes a part of them as if incorporated therein.[119]

Legislation Judicial in Nature.—The legislature only can make laws; the courts construe the laws; the executive enforces the laws. This is the general statement, because the Constitution divides the American government into three great departments, Legislative, Executive, and Judicial, in order to lodge great powers—dangerous powers, if improperly used—in different hands, and thereby lessen the danger of their misuse, and to preserve liberty.

[116] Louisville & N. R. R. v. Schmidt, 177 U. S. 230; 20 Sup. Ct. 620.

[117] Brown v. New Jersey, 175 U. S. 172; Murphy v. Massachusetts, 177 U. S. p. 163; Bolln v. Nebraska, 176 U. S. 83.

[118] Apex Trans. Co. v. Garbade, 32 Ore. 582, citing Chicago R. Co. v. City, 166 U. S. 224, and Lent v. Tillson, 140 U. S. 316.

[119] Sedgwick, Con. & Stat. L. 629; Bronson v. Kinsie, 1 How. 311; Roberts v. Cocky, 28 Grat. 207; Walker v. Whitehead, 16 Wall. 314.

This is one of the basic principles of American republican government found in all our constitutions. The line of demarkation between the respective functions of these several departments is in theory, if not in practice, very marked. The fathers of the republic looked to this as the polar star and sure guaranty of governmental freedom. Therefore, if an act of a state legislature is not in its nature purely legislative, but is in its nature judicial, the legislature has usurped judicial power, and under state constitutions that act would be void, and if it affect liberty or property, it affects them without due process, in violation of state constitutions and the Fourteenth Amendment. "The difference between the departments undoubtedly is that the legislature makes, the executive executes, and the judiciary construes the laws," said Chief-Justice Marshall in Wayman v. Southard,[120] and likewise Chief-Justice Gibson.[121] In the Virginia Supreme Court is a very luminous discussion in able opinions by Judges Christian, Anderson, Staples, Moncure and Joynes upon the distinction between the different departments and their functions.[122] Judge Christian said: "No particular definition of judicial power is given in the constitution; and, considering the general nature of the instrument, none was to be expected. But the terms used are still sufficient to designate, with clearness, that department which should interpret and administer laws from that department which should make laws. The former decides upon the legality of claims and conduct; the latter makes rules upon which

[120] 10 Wheat. 46.

[121] Greenough v. Greenough, 11 Pa. St. 494.

[122] Griffin v. Cunningham, 20 Grat. 31.

those decisions should be founded. The law is *applied* by the one, and is *made* by the other. Cooley's Const. Limitations, 92, 'To declare what the law *is, or has been,* is judicial power; to declare what the law shall be, is legislative.' "[123]

Under these principles, if a legislature undertakes to nullify a judgment, reopen a case by granting a new trial, or directing or authorizing a court to do so, or grants an appeal, or continuance, or declares a past contract or conveyance invalid, or pass any act operative upon liberty, life or property, which is judicial in its essence, it is contrary to the due process demand of the Constitution, and void.[124] The act simply usurps judicial authority.

[123] See Cooley, Con. Lim. 87, 95, 174; Sedgw. Stat. & Const. L. 138, 146.

[124] Griffin v. Cunningham, 20 Grat. 31, 51; Wheeling Bridge Case, 18 How. 421; Linkons v. Shafer, 28 Grat. 775; Ratcliffe v. Anderson, 31 Grat. 105; McCullough v. Virginia, 172 U. S. 102; Kilburn v. Thompson, 103 U. S. 168.

Chapter 14.

BUSINESS LICENSES.

The power of the states under the head of taxation and, in some instances, also under the head of police, to impose the obligation on certain persons carrying on certain trades or callings or business, to obtain a license to do so, and, where the state chooses, to impose taxation on the same, is beyond question. The doctrine laid down in the Georgia Case of Singer Company v. Wright,[1] that a license tax on some occupations and not on others is no violation of the Fourteenth Amendment, and does not deny the equal protection of the law called for by it, and is not unwarranted class legislation by the state, is sound. The state may, and does, by direct act for state purposes impose license taxes on specific occupations; and it may lawfully delegate to counties and municipal corporations the power, for their local purposes, to grant such licenses and impose taxes thereon. To enforce legislation or ordinance so providing, the state or the municipal corporation may prescribe a penalty. This might seem to violate that provision of the amendment relative to the equal protection of the laws. Anyone, as a general rule, may

[1] 25 S. E. R. 249.

exert his capacity and talents, and use his property, to make a living in any lawful business. This is liberty, and to grant a license to one, and not to another, to carry on such business might seem to be an unlawful restriction of this liberty; but this right of liberty, great as it is, sacred as it is, like the right of even life and property, must be held subject to the legitimate constitutional exercise of the police and taxing power of the state. Licenses, and taxation thereon, have been everywhere immemorially used, and as the Fourteenth Amendment does not invade the taxing and police power of the states, this license system is not repugnant to the amendment.[2]

Under this principle an ordinance of Chicago authorizing the issue of license to sell cigarettes on payment of a tax, and utterly forbidding the sale without a license, was held to be no violation of the Fourteenth Amendment in the case of Gundling v. Chicago.[3] That case holds that the delegation of power to the mayor of a city to grant or refuse such license is no violation of the Fourteenth Amendment on the score of its being arbitrary legislation or authority; nor is the requirement of a tax of $100, because "greater than expense of issuing license and providing regulation." The court said that it was not like the case of Yick Wo v. Hopkins, where the ordinance granted arbitrary power, without reference to discretion, in a legal sense, to grant or refuse, and to refuse because of rates; but that in the Chicago case the delegation

[2] Crowley v. Christensen, 137 U. S. 86; License Tax Cases, 5 Wall. 462; Black Intox. Liq. Sec. 46; Burroughs, Taxation, 146; Cooley. Taxation, 472, 592; Phenix Co. v. State, 118 Ala. 143, 72 Am. St. R. 143.

[3] 177 U. S. 183, 20 Sup. Ct. 633.

of authority to the mayor to grant or refuse the cigarette license was a legal delegation of discretion and authority to judge of the personal fitness of the person asking the license, and to judge of the sufficiency of the bond—a legal discretion to say whether the conditions prescribed by law had been complied with, not an arbitrary discretion, as the mayor was bound to grant the license if such condition were complied with. The court said that this was no denial of the equal protection of the law. Such provisions are very common, usual and necessary in cities and towns. The court said it was within the proper exercise of the police power. As said in Crowley v. Christensen,[4] the possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order and morals of the community. As to the amount of the tax. As held in Royall v. Virginia,[5] the payment required is a tax on business, which the government may demand as a precedent to the privilege of its transaction, and that government may fix the price of the privilege.

Federal Licenses are mere taxes, not properly licenses, as they do not grant the privilege of the business where that business is prohibited or under restrictions by state taxation or license laws, and notwithstanding such federal taxation, the state law must be complied with, otherwise the necessary functions of the state for existence would be sapped or crippled materially. Both governments must possess this power of taxation, and the exercise of it

[4] 137 U. S. 86.
[5] 116 U. S. 579.

by one must not hinder the exercise of it by the other. The Act of Congress[6] provides that payment of taxes imposed by the internal revenue laws for carrying on any trade or business shall not be held to exempt any person from penalty or punishment provided by state law for carrying on the same, or authorize the commencement or continuance of such trade or business contrary to the laws of a state, nor to prohibit a state from placing a tax on such trade or business.[7] The cases show that the nation can not grant but only tax licenses.

[6] Rev. Stat. Sec. 3243.

[7] License Tax Cases, 5 Wall. 462; Peryear v. Commonwealth, 5 Wall. 475; U. S. v. Dewitt, 9 Wall. 41; Weber v. Va. 103 U. S. 346; Commonwealth v. Sheckles, 78 Va. 36; Plumley v. Mass. 155 U. S. 461.

Chapter 15.

TAXATION.

What property can a state tax consistently with due process of law, consistently with equality before the law, or rather, consistently with legitimate state authority, so that we may say the party is not deprived of property without due process of law, and is not denied the equal protection of the law, and is not, as a non-resident, brought under state authority unlawfully? In Bristol v. Washington Co.[1] it is held that personal property of a citizen and resident of one state invested in bonds and mortgages in another state is subject to taxation in the latter state. Jurisdiction in the federal court in the case was on the claim that the allowance by the U. S. Circuit Court of a claim for taxes against a dead person's estate was a deprivation of property without due process of law, an abridgment of the privileges and immunities of a citizen of the United States, and a denial of the equal protection of the law, contrary to the provisions of the Fourteenth Amendment; but all these theories were overruled by the Supreme Court. The court held that though generally the domicile of the owner of personal property is its *situs,*

[1] 177 U. S. 133, 20 Sup. Ct. 585. See Pullman Co. v. Pa., 141 U. S. 18. Insurance Company may be taxed for shares of non-residents. State v. Travelers' Ins Co., 47 Atl. 299.

yet not invariably so, as for purposes of taxation domicile may be one place, actual *situs* of property another. The court said that corporeal property is everywhere conceded to be taxable where it is actually situated. A credit which can not be regarded as situated in a place merely because the debtor resides there must usually be considered as having *situs* where it is owned, at the domicile of the creditor. The creditor may, however, give it a business *situs* elsewhere, as where he places it in the hands of an agent for collection or renewal with a view to re-loaning it. The court cited New Orleans v. Semple,[2] where taxes were levied on money deposited and on loans, and it was held that the statute of Louisiana taxing them was not against the Fourteenth Amendment. Tappan v. Merchant's Bank[3] was cited as separating national bank shares from their owner and giving them a *situs* of their own for taxation where they actually are. The same doctrine in Pullman Car Company v. Pennsylvania.[4] The court cited Savings Society v. Multnomah,[5] where a statute of Oregon taxed the mortgages of a non-resident mortgagee on real estate situated in Oregon, and it was held to be warranted by the Fourteenth Amendment. These late cases assert "The right of every state to tax all property, real and personal, within its jurisdiction" as unquestionable, as held in McCullough v. Maryland.[6]

This power of a state is carried so far in Coe v. Errol[7]

[2] 175 U. S. 309.
[3] 19 Wall. 490.
[4] 141 U. S. 22.
[5] 169 U. S. 427.
[6] 4 Wheat. 316, 429.
[7] 116 U. S. 517.

that it was decided that "goods and chattels within a state are equally taxable whether owned by a citizen of the state or a citizen of another state, even though the latter be taxed in his own state for the value of the same goods as part of his general estate." See also State Railroad Tax Cases.[8] Bristol v. Washington[9] gives full insight into the right of a state to tax property actually within it. It settles that goods and chattels, and stocks and debts or credits, if actually within a state, though belonging to a non-resident, may be taxed by it. Stock in banks may be taxed where the bank is. The national banking act does this as to stock in them.

In Union Refrigerator Company v. Lynch,[10] a Kentucky corporation, which engaged in furnishing refrigerator cars for transportation of freight and had some cars in use in Utah, was held taxable on those cars in Utah. The court said that taxation of the ten cars was not unconstitutional on the theory either that they had no *situs* in Utah or that such taxation was an interference with interstate commerce. The case mentioned cited and followed the case of Refrigerator Company v. Hall.[11] The case holds that where a corporation of one state brings into another state to there use and employ a portion of its movable personal property, the latter state may tax it like property of its own citizens, though the items of such property are not continuously the same, but constantly changing according to exigencies of business, and

[8] 92 U. S. 575.
[9] 177 U S. 133, 20 Sup. Ct. 585.
[10] 177 U. S. 149; 20 Sup. Ct. 631.
[11] 174 U. S. 70.

that the tax may be fixed by an appraisement and valuation of the average amount of property habitually used in the state. The interstate commerce clause of the Constitution would not forbid this taxation, as the court held. This is also shown by Adams Express Company v. Ohio.[12]

Foreign Corporations must dwell in the place of their creation and can not migrate to another sovereignty, their habitat being in the state of their creation, though a foreign corporation may do business in all states where its charter allows and the local laws do not forbid.[13] But it is to be understood that a state may grant or refuse the privilege to a foreign corporation to do business in it, or may place it under regulations limiting the right without taking away liberty or property contrary to the Fourteenth Amendment, and without denying its equal protection. A state has the right to impose terms upon a foreign corporation doing business within it, except federal business. This is clearly shown by the full discussion of the subject found in two cases recently decided in the Supreme Court, holding that an act of Texas forbidding a foreign corporation from doing business violating state law does not violate the amendment.[14]

Taxation of Express Companies.—A tax on the property of express companies within a state, the taxable value of which is determined with reference to the whole capital, has been held valid, as no interference with interstate

[12] 165 U. S. 194. Pullman Co. v. Pa. 141 U. S. 18.

[13] Railroad v. Koontz, 104 U. S. 12; Humphreys v. Newport News Co. 33 W. Va. 137.

[14] Waters-Pierce Oil Co. v. Texas, 177 U. S. 28; N. Y. Life Co. v. Craven, 178 U. S. 389; 20 Sup. Ct. p. 965.

commerce.[15] The case follows those holding that property of a corporation in several states might be valued as a unit for purposes of taxation, taking into consideration its uses and all elements of value, and a proper proportion of the whole, fairly ascertained, might be taxed by the state, citing numerous cases.

Condemnation of Property.—I have already adverted to the common doctrine that private property may be taken for public use upon compensation being paid or secured to be paid, but that it can not be taken for private use at all. I have since met with the case of *in re* Tuthil,[16] decided by the Court of Appeals of New York, holding that an amendment to the state constitution authorizing the passage of general laws permitting owners or occupants of agricultural lands to construct ditches on the lands of others under proper restrictions, on payment of compensation, violates the Fourteenth Amendment, as depriving a person of property without due process of law, in that it authorizes a citizen to take property by the exercise of the right of eminent domain primarily for his own benefit, not sanctioned as a public use, either by long acquiescence or by judicial or legislative precedents. The case is in this respect notable in that its theory is that as it had been the law, before the amendment of the state constitution, that private property could not be taken for private use, the state could not amend its constitution so as to do so because of the Fourteenth Amendment. If such is the true interpretation of that case, the question occurs to me, Is this case clearly sound law? Does the mere fact that

[15] Sanford v. Poe, 37 U. S. App. 378.
[16] 57 N. E. 303.

before the Fourteenth Amendment the state constitution restrained the taking of private property for private use make the amendment disable the state from a change of its constitution in this respect? Does that amendment disable a state from changing its laws? Some state constitutions once required indictment by a grand jury or trial by twelve jurors; yet state constitutional amendments substituting an information in place of an indictment, or allowing trial by less that twelve jurors, have been held within the competency of the state, and not inconsistent with the Fourteenth Amendment.[17] I do not clearly see that a state can not, by its constitution, take private property for private use, with compensation, unless we are able to assert that general doctrine, which is asserted by some, that there be some acts, such as taking one man's property for another's use, that a state can not authorize even though unrestrained by constitutional prohibition. Judge Story so asserted.[18] Others have made this broad declaration; but where the constitution does not say nay, the courts can not say nay, the state is omnipotent.[19] Where will you find its limit of lawful rein? Only in some vague doctrine that it is violative of the abstract, fundamental principle of republican government.[20]

Lunacy Inquisition.—Does this proceeding, whatever its form, having for its direct purpose the establishment

[17] Hurtado v. California, 110 U. S. 537; Maxwell v. Dow, 176 U. S. 581.

[18] Wilkinson v. Leland, 2 Pet. 657.

[19] Holyoke v. Lyman, 15 Wall. 500.

[20] State v. Wheeler, 25 Conn. 290; Town v. Pace, 25 Grat. 15; Sedgwick, Stat. & Cons. Law, 173.

of a person's lunacy, demand a jury in order to be due process? If found to be a lunatic, the person is actually deprived of liberty, he is bodily imprisoned, his property is taken from his control and custody, and thus the result is as grave to him as a conviction of crime. The hasty answer to this question, seeing the seriousness of such a finding, would be naturally that a jury would be indispensable; yet it is not so, unless, as in Missouri, statute law requires it. Why? Because, as held in Black Hawk v. Springer,[21] the provision in the constitution for jury trials for the safety of liberty is meant only for proceedings for crime. This gives a reasonable solution as to liberty and deprivation of property. The clause giving a jury in cases where the amount or value in controversy is over a certain sum plainly does not apply to the case. The reason why the Fourteenth Amendment does not require a jury is that often mentioned in this work, namely, that wherever before the amendment a certain procedure was the due and ordinary procedure in the particular case, it so continues under the Fourteenth Amendment. A common law inquisition of lunacy, which was due process long anterior to this amendment, did not require a jury trial as to the lunacy.[22] A jury in a state court is not demanded by the U. S. Constitution.[23] But the authorities conflict on this question. Some hold the jury essential in lunacy cases.[24]

[21] 58 Iowa, 417.

[22] Nobles v. Georgia, 168 U. S. 398; Dowdell Case, 61 Am. St. R. 290.

[23] Walker v. Sauvinet, 92 U. S. 90.

[24] Matter of Dey, 9 N. J. Ch. 181; Smith v. People, 65 Ill. 375.

Anyone may detain temporarily a person actually insane who is dangerous, as a matter of necessity, or of manifest prudence; but for permanent confinement an inquisition pursuant to law is necessary, as otherwise it would be a deprivation of liberty without due process.[25]

Vagrants, Drunkards.—Great police powers are exerted against these. They may be lawfully detained and deprived of liberty without jury. Such has been a lawful procedure in such cases time out of mind under the common law. Statutes generally authorize it, but they are simply declarative of common law police power.[26] The fact that such procedure antedated constitutional provision guaranteeing the jury right is the only adequate explanation of this great power.

Jury to Fix Punishment.—This is not a part of the real trial over the criminal fact. After the criminal fact has been duly found by a jury, the constitutional demand of a jury trial has been satisfied, and it does not extend to the fixing of punishment.[27] Nor is a jury necessary to determine the degree of murder after confession of the fact. The confession dispenses with the necessity of a jury trial to ascertain the criminal fact, the *corpus delicti*.[28]

Trading Stamps.—An act prohibiting the giving of trading stamps authorizing a person to receive from another person than the seller some other article than

[25] Van Duzen v. Newcomer, 40 Mich. 90.
[26] Tiedman, Police Power, Secs. 46, 47.
[27] Skelton v. State, 149 Ind. 641.
[28] State v. Almy, 67 N. H. 274.

that sold violates the liberty clause of the Fourteenth Amendment.[29]

Heating Cars by Stoves.—A statute prohibiting it on railroads over fifty miles long, held not to take property without due process of law or deny the equal protection of the law.[30]

Taking Railroad Property for Private Use.—An order of a state court requiring a railroad company to surrender its property as a site for a private elevator, takes that property without due process.[31]

Petroleum Illumination.—An act prohibited the use of pretroleum products for lights emitting a combustible vapor at lower temperature than 105 degrees except in certain kind of lamps. It was held that as there were other lamps as safe, the act was contrary to the Fourteenth Amendment in abridging the privileges and immunities of citizens of the United States, and as denying the equal protection of the laws.[32]

Selling Meats in Certain Places.—An ordinance prohibiting those engaged in selling dry goods, clothing, jewelry and drugs from selling meats, fish, butter, cheese, lard, vegetable or other provisions, was held not a regulation of trade to promote health, but an arbitrary prohibition interfering with property rights, contrary to the Fourteenth Amendment.[33]

[29] State v. Dalton (R. I.) (1900), —.

[30] New York, etc. Co. v. People, 165 U. S. 628, 17 Sup. Ct. 418.

[31] Missouri Pac. Co. v. Nebraska, 164 U. S. 403, 17 Sup. Ct. 130.

[32] State v Santee, 82 N. E. 445.

[33] City of Chicago v. Netcher, 183 Ill. 104. Hospital may be prohibited in built-up section of city consistently with the Fourteenth Amendment, Commonwealth v. Charity Hospital, 47 Atl. 980 (Pa.).

Jury Waiver in Misdemeanors, Valid,[34] even in murder case,[35] if statute allow.

Dogs.—Unlicensed dogs, though they are property, may be killed by anyone. A person may kill a dog attacking him or any member of his family, or anyone in his company, or any dog which kills fowls or stock. A fine discussion of this subject will be found in Harris v. Eaton.[36]

Ordinance Against Moving Building on or Across a Street without the consent of the mayor does not deny equal protection of the law or due process of law.[37]

Accused Becoming Witness.—If one on trial for crime waives his constitutional privilege of silence and becomes a witness, and testifies to an alibi or other fact, he may be cross-examined as to every fact having any bearing as to that fact, but not as to new facts about which he did not testify in his examination-in-chief.[38]

Rules of Evidence and Criminal Procedure.—The state may change these consistently with the amendment, as elsewhere stated (p. 292). A strong instance of this is the late case of Thompson v. Missouri,[39] where an act allowing a comparison of hand-writing as competent evidence, which evidence was not competent until that act, and not competent at the time of the commission of the offense, was held proper evidence, and not *ex post facto,* and not open to the charge that it was contrary to due

[34] Brewster v. People, 183 Ill. 143; State v. Grigg, 34 W. Va. 79.
[35] Hallinger v. Davis, 146 U. S. 314.
[36] 20 R. I. 81.
[37] Wilson v. Eureka, 173 U. S. 32, 19 Sup. Ct. 317.
[38] Fitzpatrick v. U. S. 178 U. S. 304.
[39] 171 U. S. 380, 18 Sup. Ct. 922.

process. Likewise the case of Hopt v. Utah[40] holding valid an act making a convict a competent witness, though not such at the date of the commission of an offense.

Eminent Domain.—Jury not Essential.—As already stated (p. 163), a jury is not essential in this proceeding to constitute due process unless the state law require it. The compensation may be fixed by commissioners, or a board, with right to review by the courts, which always exists. It is no denial of due process that the statute makes the finding by the jury or commissioners final, leaving to the courts only the question whether any erroneous basis was adopted in the appraisal or error in the proceeding.[41]

Driving Cattle over Road Bank.—An act making anyone driving cattle over a highway constructed on a hillside liable to damage does not deprive him of property without due proces of law, or deprive him of the equal protection of the laws.[42]

Fishing.—The state has power to make regulations to preserve fish in its waters from destruction, as elsewhere shown (p. 220). It may even regulate it on one's own land.[43]

Fishing Confined to State Citizens.—An act of Virginia limited the right to take oysters and fish from its waters to its own people. It was attacked as an infraction of the Fourteenth Amendment as denying the people of other

[40] 110 U. S. 574.

[41] Long Island Co. v. Brooklyn, 166 U. S. 685, 17 Sup. Ct. 718; Backus v. Fort Street Depot Co. 169 U. S. 557, 18 Sup. Ct. 445; Gilmer v. Hunnicutt, 35 S. E. 521.

[42] Jones v. Brim, 165 U. S. 180, 17 Sup. Ct. 282.

[43] State v. Thereault, 70 Vt. 617, State v. Dow, 47 Atl. 734.

states the privileges of citizens of the United States and of the equal protection of the laws; but the Supreme Court held that the act did not infringe the Fourteenth Amendment, that it was not a privilege of a citizen of the United States to fish in the waters of Virginia flowing from his federal citizenship, and that the state had the right to limit the use of its public property to its own people.[44]

Usury.—Curative Act.—An act taking away the defense of usury has been held valid on the theory that it does not change the agreement or contract, but only removes a bar to its enforcement. The case holds the building association act dispensing with the plea of usury valid.[45]

Curative Act.—An act legalizing city bonds held valid.[46]

Tax Deed, Assault on.—A statute limiting the time within which an attack might be made upon a tax deed held to be a statute of limitations and valid, as to the Fourteenth Amendment.[47]

Foreign Corporation, Mortgage by.—A state act prohibited foreign corporations from taking mortgages for loans, and a later act made them valid, and it was held that the second act did not impair the obligation of the contract of a mortgage taken between the time of the two acts, and did not deprive of property without due process of law contrary to the Fourteenth Amendment.[48]

Roads, Taking Land for.—An act directing supervisors of two adjoining towns to lay out a new road or alter

[44] McCready v. Virginia, 94 U. S. 391.

[45] Iowa Savings, etc. v. Heidt, 77 N. W. 1050; Danville v. Pace, 25 Grat. 1.

[46] Schenck v. City, 152 Ind. 204.

[47] Sarinac, etc. v. Roberts, 177 U. S. 318, 20 Sup. Ct. 642.

[48] Gross v. U. S. Co. 108 U. S. 477; Evans-Snider-Buel Co. v. McFadden, 105 Fed. 293, is a full discussion, holding valid retroactive act affecting attachment before judgment on it.

an old one was attacked as contrary to the Fourteenth Amendment, the point being that it made no provision for notice to the parties interested, and did not provide compensation for the land; but it was held that as other road acts were to be applied in carrying out the act in question, and these acts provided for the ascertainment of compensation, the act in question did not take property without due process, or deny equal protection of the laws.[49]

Additional interest on affirmance of judgment held no denial of equal protection.[50]

[49] Hurst v. Town, 82 N. W. 1099.
[50] Syndicate Co. v. Bradley, 7 Wyo. 228.

Chapter 16.

EQUAL PROTECTION OF THE LAW.

We have seen how far-reaching are the clauses of section 1 of the Fourteenth Amendment relative to the rights, privileges and immunities of citizens of the United States and the prohibition against all state action depriving persons of life, liberty or property without due process of law; but far-reaching and wide as are those clauses, the framers of the amendment were not content with them, but added another clause providing that no state shall "deny to any person within its jurisdiction the equal protection of the laws." The authors of the amendment inserted this clause as a safety clause in order to guarantee rights which might not fall under the protection of the antecedent clauses, and under them secure rights given by laws. What does this clause mean? It is difficult to say; nor is it safe to say. As the Supreme Court has said with reference to other clauses, it is impracticable, not desirable, and dangerous to attempt in advance any inflexible, unchangeable, cast-iron rule of interpretation or application. Each case must stand on its own features and merits as it arises in the course of time and in changing conditions and necessities. We can only look

at the general spirit and purpose of this clause. We may say that the Fourteenth Amendment first incorporated it in our constitutional law. It is true that our forefathers, in the immortal Declaration of Independence, declared in 1776: "We hold these truths to be self-evident: that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these, are life, liberty and the pursuit of happiness; that to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed." Thus these founders of the republic declared as axiomatic principles which are substantially those enunciated by this clause of the Fourteenth Amendment; but whilst the principles of the Declaration of Independence are the normal principles of the government of this great republic, "inwoven with our frame," silent law, yet it is only silent, not express constitutional ordinance, and hence, it may be supposed, the authors of the Fourteenth Amendment deemed this clause of equal protection of the laws prudent and essential as a part of the very fabric of constitutional law. Antecedent to the Fourteenth Amendment the Supreme Court of Tennessee used language seeming to be prophetic of its coming and vindicative of its policy in Wally's Heirs v. Kennedy.[1] "The rights of every individual must stand or fall by the same rule or law that governs every other member of the body politic or land under similar circumstances; and every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing

[1] 2 Yerg. (Tenn.), 554.

by affording remedies leading to similar circumstances, is unconstitutional and void. Were it otherwise, odious individuals and corporations would be governed by one law, the mass of the community and those who made the law by another; whereas, the like general law affecting the community equally could not have been passed." That extract is a fair interpretation of the equality clause of the amendment. Magna Charta, as commonly published, is only part of the Act of June 15, 1215, given by King John. It is Chapter 39 of that act; but that act contains more. It contains many matters, and among them is found Chapter 40, which we may say is the prototype of this equality clause, in the language, *"Nulli vendemus, nulli negabimus, aut differemus, rectum aut justitiam."* (To no one will we sell, to no one will we deny, to no one will we delay, right or justice.) The principle of this clause of the amendment is high constitutional law, without which the vitality of the republic would be largely sapped, a principle that must exist in all free governments. It is basic and fundamental therein. It protects the plowman following his plow; it protects the millionaire in his palace. It stretches out its beneficent hand of equal right under the law to each and all alike within the bounds of the nation, wherever the national jurisdiction extends. It says, "Equal rights to all, special privileges to none." Cicero said in his work *De Respublica* that equality of right was the basis of the commonwealth; for as property could not be equal, and talents are not equal, rights ought to be held equal among all citizens of the state, which is in itself nothing but a community of right. This great doctrine reigns in all lands where liberty exists,

and especially in this land under the imperative mandate of the Supreme Constitution, and it tells the governors that they must make and execute fair and impartial laws for the millionaire in his palace, for the man holding the curule dignity of lofty public station, and for the laborer with the pick or plow.

It will be seen from the words of the clause in question that it applies to all persons of either sex, of any age, of any race, native, foreign or alien, so they be within the jurisdiction of the United States.[2] Senator Sumner took an active part in the proposal of this amendment. In a speech upon it he expressed his construction of it as follows: "These are no vain words. Within the sphere of their influence no person can be created, no person can be born, with civil or political privileges not equally enjoyed by all his fellow citizens; nor can any institution be established recognizing distinction of birth. Here is the great charter of every human being drawing vital breath upon this soil, whatever may be his condition and whoever may be his parents. He may be poor, weak, humble or black; he may be of Caucasian, Jewish, Indian or Ethiopian race; he may be of French, German, English or Irish extraction; but before the Constitution all these distinctions disappear. He is not poor, weak, humble or black; nor is he Caucasian, Jew, Indian or Ethiopian; nor is he French, German, English or Irish. He is Man, the equal of all his fellow men. He is one of the children of the state, which, like an impartial parent, regards all its offsprings with an equal care. To some it may

[2] Slaughter-House Cases, 16 Wall. 36.

justly allot higher duties according to higher capacities; but it welcomes all to its equal, hospitable board. The state, imitating the divine justice, is no respecter of persons." Let us turn to judicial exposition of this amendment. "It stands in the Constitution as a personal shield against all unequal, impartial legislation by states, and injustice which follows from it, whether directed against the most humble or the most powerful; against the despised laborer from China, or the envied master of millions."[3]

This clause operates upon all agencies by which state law is made and enforced, all departments of state government, legislative, executive, judicial, and all subordinate agencies.[4]

The clause of equality before the law protects not only natural persons, but also those artificial persons called corporations, it regarding them as persons under it.[5]

What is the practical meaning of the clause? Its words, "equal protection of the laws," in themselves are a good general definition, especially when we come to the task of applying them to a particular case. None but general definitions, which are innumerable in varying phrase, can be given. We can only apply it to cases as they come. What is now equal protection would not have been so heretofore; what is now such may not be such in future. Times, society, and their wants change. Take the police power of a state. What would infract the amendment now, may not do so some years hence. The needs of government

[3] Yick Wo v. Hopkins, 118 U. S. 356.

[4] *Ex parte* Virginia, 100 U. S. 339; C. B. & Q. Ry. Co. v. Chicago, 166 U. S. 226.

[5] Smith v. Ames, 169 U. S. 466.

change with changing conditions. Wonderful is the great number of cases, not only in the state but in federal courts, involving this amendment. Everybody who is in stress these days is appealing to the federal courts for protection; and as said in Holden v. Hardy[6] by the Supreme Court, these cases "demonstrate that in passing on the validity of state legislation under it, this court has not failed to recognize the fact that the law is, to a certain extent, a progressive science; that in some states methods of procedure which at the time the Constitution was adopted were deemed essential to the protection and safety of the people, or the liberty of the citizen, have been found to to be no longer necessary; that restrictions which had formerly been laid upon the conduct of individuals had proved detrimental to their interests; and other classes of persons, particularly those engaged in dangerous or unhealthy employments, have been found to be in need of additional protection; but this power of change is limited by the fundamental principles laid down in the Constitution."

Justice Field, in the opinion in Barbier v. Connolly,[7] said the Fourteenth Amendment in declaring that no state "shall deprive any person of life, liberty or property without due process of law, nor deny to any person the equal protection of the laws," undoubtedly "meant, not only that there should be no arbitrary spoliation of property, but that equal protection and security should be given to all alike under like circumstances in the enjoyment of their personal and civil rights, that all persons

[6] 169 U. S. 366.
[7] 113 U. S. 27.

should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their person and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition; and that in the administration of criminal justice no difference or higher punishment should be imposed upon one than such as is prescribed to all for like offenses. But neither the amendment, broad as it is, nor any other amendment, was designed to interfere with the power of the state, sometimes called the police power, to prescribe regulations, to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity. From the very necessity of society, legislation of a special character, having these objects in view, must often be had in certain districts, such as for draining marshes and irrigating arid plains. Special burdens are often necessary for general benefit—for supplying water, preventing fires, lighting districts, cleaning streets, opening parks, and many other objects. Regulations for these purposes may press with more or less weight upon one than another, but they are designed not to impose unequal or unnecessary restrictions upon anyone, but to promote, with as little individual inconvenience as possible, the general good. Though in many respects necessarily special in their char-

acter, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment. In the execution of admitted powers unnecessary proceedings are often required, which are cumbersome, dilatory and expensive, yet, if no discrimination be made, and no substantial right be impaired, they are not obnoxious to any constitutional objection. The inconveniences from this clause in the administration of the law are matters entirely for the consideration of the state; they can be remedied only by the state."

"The right to the equal protection of the laws is not denied by a state court when it is apparent that the same law or course of proceedings would be applied to any other person in the state under similar circumstances and conditions."[8]

There can not be distinctions in granting or enforcing rights, or in imposing burdens, that are arbitrary, unfair distinctions, those made under such circumstances as make them unequal, not called for by facts justifying such distinctions.

"The inhibition that no state shall deprive any person within its jurisdiction of the equal protection of the laws, was designed to prevent any person, or class of persons,

[8] Tinsley v. Anderson, 171 U. S. 101; State v. Broadbelt, 89 Md. 565, 73 Am. St. R. 201.

from being singled out as a special subject for discriminating and hostile legislation."[9]

"The object of the Fourteenth Amendment in respect to citizenship was to preserve equality of right and to prevent discrimination between citizens, but not to radically change the whole theory of the relations of the state and federal government to each other and of both governments to the people."[10]

Classification Lawful.—In various cases, such as tax laws, and in many other instances, the legislature may classify persons and things in the administration of government. It does not follow that because one man of one class happens to be treated by law differently from another in another class that the equality clause is violated. It "only requires the same means and methods to be applied impartially to all the constituents of a class, so that the law shall operate equally and uniformly upon all persons in similar circumstances." [11]

The state may, consistently with this clause, classify subjects of taxation and apply different methods of valuation and taxation consistently with the federal Constitution.[12]

"It prescribes no rigid equality, and permits to the discretion and wisdom of the state a wide latitude as far as the interference of this court is concerned. Nor with the

[9] Pembina v. Pennsylvania, 125 U. S. 188. See Steed v. Harvey, 72 Am. St. R. 789.

[10] *In re* Kemmler, 136 U. S. 436.

[11] Kentucky R. R. Tax Cases, 115 U. S. 321.

[12] Kentucky R. R. Tax Cases, 115 U. S. 321; Magoun v. Illinois, 170 U. S. 283; Home Company v. New York, 134 U. S. 594; State v. Broadbelt, 89 Md. 565; 73 Am. St. R. 201; New York v. N. Y. Clearing House, 179 U. S. —; American Sugar Co. v. Louisiana, 179 U. S. 89.

impolicy of the law has it concern. Mr. Justice Field said, in Mobile County v. Kimball, 102 U. S. 691, that this court is not a harbor in which can be found a refuge from ill-advised, unequal and oppressive legislation. It is hardly necessary to say that hardship, impolicy or injustice of state laws is not necessarily an objection to their constitutional validity. The rule, therefore, is not a substitute for municipal law; it only prescribes that that law have the attribute of equality, indisriminate operation, and equality of operation does not mean on persons merely as such, but on persons according to their relations. In some circumstances it may not tax A more than B, but if A be of a different trade or profession than B it may. And in matters not of taxation, if A be a different kind of corporation than B, it may subject A to a different rule of responsibility to servants than B, Missouri Pacific Railroad v. Mackey, 127 U. S. 205; to a different measure of damages than B, Minneapolis Railway v. Beckwith, 129 U. S. 26; and it permits special legislation in all its varieties, Minneapolis, etc., v. Herrick, 127 U. S. 210; Duncan v. Missouri, 152 U. S. 377. In other words, the state may distinguish, select and classify objects of legislation, and necessarily this power must have a wide range of discretion. It is not without limitations, of course. 'Clear and hostile discriminations against particular persons and classes, especially such as are of unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition,' said Mr. Justice Bradley in Bells Gap Railroad v. Pennsylvania, 134 U. S. 232, 237. And Mr. Justice Brewer, in Gulf, etc., Railway v. Ellis, 165 U. S. 150,

after a careful consideration of many cases, said: 'The mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and in all cases it must appear, not merely that a classification has been made, but also that it is based on some reasonable ground—something which bears a just and proper relation to the attempted classification, and is not a mere arbitrary selection.'" Justice McKenna in McGoun v. Illinois.[13] See Atchison, T. & St. F. R. R. v. Mathews.[14]

Fellow-Servant Statutes.—The common law does not hold a master liable for damages suffered by one servant while in his master's service from the wrongful negligence of another servant of the common master. A statute changed this common law rule, and made railroad companies liable for damages in such case, the act applying only to railroads. It was held to be consistent with the equality clause of the Fourteenth Amendment, and a valid regulation under the police power of the state.[15] The court said that railroad service was subject to peculiar hazards, and that this consideration justified the application of the act to railroads alone.

Fencing Railroads.—An act requiring railroad companies to fence their roads, and making them liable for double damages for stock killed in default of such fence, was held not to deny equal protection to such companies,

[13] 170 U. S. 283.

[14] 174 U. S. p. 105.

[15] Railway v. Mackey, 127 U. S. 205; Tullis v. Lake Erie Co. 175 U. S. 348.

or to deprive them of property without due process of law.[16]

Colored Jurors.—The right of colored persons to sit on juries has been several times considered in the Supreme Court. In the first case on the subject[17] the validity of a state statute limiting jurors to white persons was involved. The court held that the Fourteenth Amendment is one of a series of constitutional provisions having a common purpose, namely, to secure an emancipated race, held in slavery through many generations, all the civil rights enjoyed by the superior race, and give it the protection of the federal government in the enjoyment of such rights whenever denied by the state; that the amendment not only gave citizenship and the privileges of citizenship to persons of color, but denied to any state the power to withhold from them the equal protection of the laws, and invested congress with power, by appropriate legislation, to enforce its provisions; that though prohibitory in terms, the amendment confers, "by necessary implication," a positive immunity of right most valuable to persons of the colored race—a right to exemption from unfriendly legislation against them distinctively as colored—exemption from discriminations imposed by public authority which imply legal inferiority in civil society, lessen the security of their rights, and are steps reducing them to the condition of a subject; that the West Virginia statute singled out and denied to colored citizens the right and privilege of participating in the administration of the law as jurors because of color, though qual-

[16] Missouri Pac. Co. v. Humes, 115 U. S. 512.
[17] Strauder v. West Virgina, 100 U. S. 303.

ified in all other respects, practically put a brand upon them, and a discrimination against them forbidden by the amendment; that it denied to them the equal protection of the laws, since the constitution of juries is a very essential part of the protection which trial by jury is intended to secure; that the very idea of a jury is that it is a body composed of peers or equals of the persons whose rights it is selected to determine; that is, of persons having the same legal status in society as that which he holds; that where the state statute secures to every white man right of trial by jury, selected from and without discrimination against his race, and at the same time permits and requires such discrimination against the colored race, because of race, the latter is not equally protected by law with the former. The court said that the amendemnt meant to declare that "the law in the state shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the state, and in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them." The court held that "protection of life and liberty against race or color prejudice was a right, a legal right, under the amendment. And how can it be maintained that compelling a colored man to submit to a trial for his life by a jury drawn from a panel from which the state has expressly excluded every man of his race because of color alone, however well qualified in other respects, is not a denial to him of equal protection?" The court was express to say that it did not deny the right of a state to make qualifications for jurors, and in so doing to make discriminations;

that it might confine the selection to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications; that the amendment was never meant to prohibit this; that its aim was to prohibit discrimination because of race or color. The West Virginia statute was held void and the conviction was annulled by reason of the violation of the Fourteenth Amendment. Same as to grand juries.[18] It quashes indictment.

But note that though at first blush one might think so, yet this doctrine does not demand mixed juries in every case where a colored man is tried, or, indeed, in any case; the decision referred to does not import that a colored person can not be lawfully tried by a jury composed wholly of whites. He may be so tried. He is not entitled to demand that one or more or half of the jury shall be colored, provided the law of the state do not exclude colored persons from jury service. If the law does not do this, the mere failure to summon colored persons for service on juries does not affect the panel summoned, or a particular jury drawn from that panel, so as to affect a conviction or demand a removal of the case from a state to a national court.[19] But the Neal Case holds that though the state jury law does not in words exclude colored persons, yet if the authorities authorized to select juries do, in fact, exclude colored men merely because colored, that exclusion gives right, not to removal to a federal court,

[18] Carter v. Texas, 177 U. S. 442, 20 Sup. Ct. 687; Collins v. State, 60 S. W. 42.

[19] Neal v. Delaware, 103 U. S. 370; Virginia v. Rives, 100 U. S. 313; Andrews v. Swartz, 156 U. S. 272; Williams v. Mississippi, 170 U. S. 213; Bullock v. State, 47 Atl. 62.

but right to quash in the state court the indictment or the trial jury, which, in case of refusal by the state court, can be enforced by writ of error to the United States Supreme Court. But this exclusion, and that it is because of race, must affirmatively appear.[20]

It has been held that where the highest court of a state had declared void its jury law because of such exclusion of colored persons, and instructed officers to disregard race in selecting jurors, though the statute remained unchanged, and in a prosecution subsequently instituted the jury was wholly of whites, it was valid, and that there was no right of removal, but that the indictment found prior to such decision should be quashed. The difference between this case and the Strauder Case is that in the Strauder Case the state court held the state law valid and refused Strauder the right to quash the panel.[21]

"The principle reaffirmed that while a state may, consistently with the purposes for which the Fourteenth Amendment was adopted, confine the selection of jurors to males, freeholders, citizens, persons within certain ages, or to persons having educational qualifications, and, while a mixed jury in the particular case is not, within the meaning of the constitution, always or absolutely necessary to the enjoyment of the equal protection of the laws, and therefore an accused, being of the colored race, can not claim as a matter of right that his race shall be represented on the jury; yet a denial to citizens of African race, *because of their color,* the right or privilege accorded to white citizens of participating as jurors in the admin-

[20] Bush v. Kentucky, 107 U. S. 110.
[21] Bush v. Kentucky, 107 U. S. 110.

istration of justice would be a discrimination against the former inconsistent with the amendment, and within the power of Congress by appropriate legislation to prevent."[22] The court upheld the act of Mississippi requiring for jury service that the party should be able to read and write and entitled to vote.

Employment of Chinese.—The constitution of California prohibited corporations from employing Chinese, and the act of the legislature imposed a penalty for so doing —a signal instance of denial of liberty of action and contract to both railroad and Chinese, and to earn a living. This was held a denial of equal protection of the law. Citizenship is not a requisite for this protection, residence only being sufficient. It was held that the Chinese resident, though not a citizen, was a "person" under the amendment. The court held that the act violated the Civil Rights Act, giving right of contract. The case is a luminous one and strong.[23]

Wrong by Individuals.—This clause of equal protection has no application to wrong done by one individual to another. The trespasser or murderer is only the individual trespasser or murderer, acting in his own wrong, not for the state, but against the will of the state, and the amendment does not touch his wrong, as it deals only with action by the state.[24]

Foreign Corporations may be excluded wholly from doing business in a state, or be allowed to do so on such terms

[22] Gibson v. Mississippi, 162 U. S. 565.

[23] *In re* Parrott, 1 Fed. 481.

[24] Civil Rights Cases, 109 U. S. 3; U. S. v. Harris, 106 U. S. 629; Va. v. Rives, 100 U. S. 313.

as the state may prescribe, without a violation of the equality clause of the Fourteenth Amendment.[25] If admitted to do business in the state, the state may deal with them as domestic corporations.[26] A corporation is a "person" under the Fourteenth Amendment; but not being a "citizen" of the state of its incorporation, it is not entitled to privileges and immunities in other states like a citizen has in his own state under Article 4, Section 2.[27]

Right to Assemble to Petition Congress for redress of grievances is a right of a citizen of the United States protected by the amendment; but the right of the people to assemble for other purposes is not one conferred by the Fourteenth Amendment, as it comes only from the state, pertains only to the state's citizens as such, and seems to be not a right protected by the amendment. It is left to the states.[28]

Discrimination, Class Legislation.—"It is no objection to a municipal ordinance prohibiting one kind of business within certain hours that it permits other and different kinds of business to be done within those hours. Municipal restrictions imposed upon one class of persons engaged in a particular business, which are not imposed on others engaged in the same business and under like circumstances, impair the equality which all can claim in in the enforcement of the laws. When the general security and welfare require that a particular kind of work

[25] Slaughter's Case, 13 Grat. 767; Pembina v. Pennsylvania, 125 U. S. 181; Waterpierce Co. v. Texas, 177 U. S. 28; N. Y. L. Ins. Co. v. Craven, 178 U. S. 389; Hooker v. California, 155 U. S. 652.

[26] Orient Co. v. Daggs, 172 U. S. 557.

[27] Orient Co. v. Daggs, 172 U. S. 557.

[28] U. S. v. Cruikshank, 92 U. S. 552.

should be done at certain times or hours, and an ordinance is made to that effect, a person engaged in performing that sort of work has no inherent right to pursue his occupation during the prohibited time." [29] It was held no violation of the amendment that the ordinance prescribed certain limits for the laundry business, and prohibited it between ten o'clock in the evening and six in the morning.

Insurance Policy.—A statute provided that in an action on a policy of fire insurance the value of the property stated in it should be conclusive beyond denial by the company, less depreciation subsequent to the date of the policy, and that the full value should be paid for total loss, and in case of partial loss payment should be proportionate to that value, and declaring any clause in a policy contrary thereto void. The court held that a foreign insurance company was not by it deprived of liberty or property without due process, or denied the equal protection of the laws; and that a corporation, while a "person," was not a "citizen" of the United States under the Fourteenth Amendment, and the act, therefore, did not abridge privileges or immunities of a citizen contrary to the amendment.[30]

Express Companies.—A statute defined for taxation an express company to be one in the business of transportation on contracts for hire with railroad or steamboat companies. Held that the statute did not discriminate against express companies in favor of others carrying ex-

[29] Soon Hing v. Crowley, 113 U. S. 703; Barbier v. Connolly, 113 U. S. 27.

[30] Orient Co. v. Daggs, 172 U. S. 557.

press matter on other conditions or under different circumstances.[31]

Charges of Suretyship.—An act allowing fiduciaries to charge as part of the expenses of executing their trust a reasonable sum paid to a trust company to go the security of such fiduciary was held not to be class legislation or to deny the owners of the estate the equal protection of the law, the reason given for such holding being that such suretyship was alike beneficial to all parties in interest.[32]

Municipal Corporations, Classification for Public Burdens.—It is everywhere held that the state has unlimited control over its municipal corporations, except so far as its own constitution may tie its hands. Under this principle an act placing five towns in a class, and organizing them into a municipal corporation, and putting on them the burden of constructing roads and bridges, and subjecting them to different control in respect thereto, was held not to deny equal protection of the law, contrary to the Fourteenth Amendment.[33]

National Flag Advertisement.—A state statute prohibited the use of the American flag for purposes of advertising, but it was held to be an invasion of the privileges and immunities of citizens of the United States, not a valid exercise of police power, and that the statute in exempting from its operation those engaged in exhibitions of art unduly discriminated in favor of a class, and violated liberty.[34] The court said that the case of Powell v. Penn-

[31] Pacific Express Co. v. Seibert, 142 U. S. 339.
[32] *In re* Clark's Estate (Pa. 1900), 46 Atl. 127.
[33] Williams v. Eggleston, 170 U. S. 304, 18 Sup. Ct. R. 617.
[34] Ruhstratt v. People (Ill.), 57 N. E. 41, 185 Ill. 133.

sylvania,[35] in holding that the enjoyment by citizens, on terms of equality with all others under similar circumstances, of the privilege of pursuing an ordinary calling or trade, and of acquiring, holding and selling property was a right under the Fourteenth Amendment, states a principle which was sound; that the right of the state to promote the general welfare must be so exercised as not to impair the fundamental right of life, liberty and property. The court said that advertising was a valuable means and instrumentality in the conduct and furtherance of private business, and that the use of the national flag therein was calculated to advance the individual's success, and was productive of no public harm, not at all detrimental to public peace or welfare or interest, and that the act, therefore, could not be justified as a reasonable exercise of the police power for healthful public ends. The court denied that the opinion and decision of a legislature that an act is one in the proper exercise of the police power is final and conclusive upon the courts upon the question of the necessity of the act, and asserted the right of the judiciary to pass upon the question whether the act was one of reasonable police regulation. The court also held that the national flag having been adopted as the emblem of national sovereignty by national law, the right to use it in a manner not unlawful, for lawful business purposes as an advertisement, was a privilege pertaining to a citizen of the United States as such, and that the act thus violated the Fourteenth Amendment. The opinion is valuable for general principles.

[35] 127 U. S. 678.

Attachment Bonds.—An act required such bonds in attachments against residents, but not in attachments against non-residents, and it was held not to deny due process or equal protection of the law.[36]

Attorney's Fee in Costs.—A statute providing that in actions against railroad companies for damages from fire caused by locomotives an attorney's fee should be included in the judgment in favor of the injured party was held not a discrimination or deprivation of property contrary to the Fourteenth Amendment.[37]

In Railway v. Ellis[38] was involved a statute which allowed an attorney's fee of $10, to be taxed in the costs in case of recovery in favor of a plaintiff having a claim less than $50 against a railroad company not paid within thirty days after its presentation, for labor, damages, overcharges, or for stock killed or injured, and the act was held to be repugnant to the Fourteenth Amendment, because denying equal protection of the law, as it applied only against railroad companies and in favor only of persons having certain demands, not to all alike.

Railroads.—Prevention of Fire.—An act imposed a tax to provide against damage from fire by certain precautions against it, but it excluded railroads from the benefit of the act, though their property was subject to the tax. The act was held void as denying the equal protection of the law secured by the Fourteenth Amendment.[39]

[36] Central Loan Co. v. Campbell, 173 U. S. 84, 19 Sup. Ct. 346.

[37] Atchison, etc. Co. v. Mathews, 174 U. S. 96; Pacific Co. v. Seibert, 142 U. S. 339; Insurance Co. v. Bayha, 8 Kans. App. 169.

[38] 165 U. S. 159, 17 Sup. Ct. 255; Paddock v. M. P. R. Co., 155 Mo. 524.

[39] Atchison, Topeka and Santa Fe Co. v. Clark, 60 Kan. 826.

Deduction of Debts from Taxes.—An act allowing a deduction of debts for taxes, but denying the benefit of the act to railroad companies, was held to deny them the equal protection of the law, contrary to the Fourteenth Amendment.[40]

Lien for Wages.—A California act gave a lien for wages to laborers, and required payment of such wages once a month, and it was held void under the Fourteenth Amendment as class legislation applicable only against corporations and in favor of their employees. The opinion is an able one upon the grave subject of liberty of contract.[41]

Repair of Viaduct by one Company.—A statute and ordinance compelled one railroad company to repair a viaduct, though it was used by others, and they were held not to deny the equal protection of the law.[42]

Tax Exemption.—A statute of West Virginia exempted tracts of less than 1000 acres of land from forfeiture for non-entry for taxation, but forfeited all other tracts, and it was held not to be a denial of the equal protection of the law contrary to the Fourteenth Amendment. The state could tax or not tax as it chose and make such exceptions as it chose under its power of taxation.[43]

Contempt.—Equal protection of the law is not denied by a procedure and punishment for contempt applicable to all persons alike.[44]

Annexing Lands to Cities.—An act allowed cities to annex lands provided they were not used for agricultural pur-

[40] St. Clara v. Southern Pac. Co. 18 Fed. 385.
[41] Johnson v. Goodyear, 59 Pac. 304.
[42] C. B. & Q. Co. v. Nebraska, 170 U. S. 57, 18 Sup. Ct. 513.
[43] King v. Mullins, 171 U. S. 404, 18 Sup. Ct. 925.
[44] Tinsley v. Anderson, 171 U. S. 101, 18 Sup. Ct. 805.

poses, when the same were not owned by a corporation. The lands were annexed and taxed by a city. It was claimed to deprive the owner of property without due process of law and to deny equal protection of the laws; but the court, by Justice McKenna, said that the owner not being a corporation, even if the act was an illegal discrimination against corporations, the plaintiff could not raise that question, because to allow a party to complain there must not be a law alone, but a law and its incidence were necessary to make the matter a justiciable right or injury, and hence the only colorable ground of complaint under the amendment was the discrimination made between agricultural and other lands. "The answer to that charge depends on the power of the state to classify objects of legislation, necessarily a broad power." The court said it had often defined this power. "The reasoning of the cases we need not repeat. It is enough to say that the rule of the Constitution leaves to the discretion and wisdom of the state a wide latitude, as far as interference by this court is concerned. It is not a substitute for municipal law; it does not invest power in this court to consider the impolicy and unjustness of state law, and the equality it prescribes is not for persons merely as such, but according to their relations." He then referred to the power of the legislature to tax one man more than another, under circumstances in language already quoted on page 321. He said that these principles had been affirmed in later cases than those he referred to, and that a classification based on difference between fire insurance and other insurance had been sustained; and also a difference between railroad and other corporations, citing Orient Insurance Company v.

Daggs,[45] and Tullis v. Lake Erie Company.[46] He referred to the case of Atchison, Topeka and Santa Fe R. R. Company v. Mathews,[47] holding that by reason of the great peril from fires from locomotives on railroads, it was in the power of a state to impose on them an attorney's fee and not impose it on an unsuccessful plaintiff. He also referred to Justice Brewer's statement in Atchison, Topeka & Sante Fe R. R. v. Mathews[48] that "it is of the essence of classification that upon the class are cast duties and burdens different from those resting upon the general public. Thus when the legislature imposes upon a railroad corporation a double liability for stock killed by trains it says, in effect, that if suit be brought for stock killed by trains against a railroad corporation it must enter court under conditions different from those resting on ordinary suitors. If beaten, it must pay, not only the damage which it has done, but twice that amount. If it succeed, it recovers nothing. On the other hand, if it should sue an individual for the destruction of its live stock it could under no circumstances recover any more than the value of that stock. So it may be said in matter of liability in case of litigation it is not placed on an equality with other corporations and individuals; yet this court has unanimously said that this differentiation of liability, this inequality of rights in the courts, is of no significance upon the question of constitutionality. Indeed, the very idea of classification is that of inequality; so that it goes without

[45] 172 U. S. 557.
[46] 175 U. S. 348.
[47] 174 U. S. 96.
[48] 174 U. S. 106.

saying that the fact of inequality in no manner determines the matter of constitutionality."

In the case in which Justice McKenna was writing he said that the distinction between tracts of agricultural lands in a certain relation to cities and land used for other purposes in such relation was material. He regarded the distinction as justified by the principle of the cases which he cited, saying: "That principle leaves to the state the adaptation of its laws to its conditions. The growth of cities is inevitable, and in providing for their expansion it may be the judgment of an agricultural state that they should find a limit in land actually used for agriculture. Such use, it could be taken for granted, would be only temporary. Other uses, certainly those to which the plaintiff puts its lands, can receive all benefits of the growth of a city and not be moved to submit to the burdens. Besides, such uses, or manufacturing uses adjacent to a city, may, for its order and health, need control. Affecting it differently from what farming uses do, may justify, if not require, their inclusion in the municipal jurisdiction. We think that within the latitude which local government must be allowed the distinction is not arbitrary, and infringes no provision of the Constitution of the United States."[49]

Taxation.—If all in like conditions are treated alike there is no violation of the equality clause of the Fourteenth Amendment, as held in Bell's Gap Railroad Company v. Pennsylvania,[50] the court saying that the amendment does not enforce an iron rule of taxation.

[49] Clark v. Kansas City, 176 U. S. 114. See Amer. Sugar R. Co. v. Louisiana, 179 U. S. 89, 21 Sup. Ct. 43.

[50] 134 U. S. 232.

Corporation Taxation.—Considering that corporations have privileges and franchises from the state which individuals do not possess, they may be taxed differently from individuals and by a different process. Taxation on a telegraph company on so much of its line as is in the state is constitutional.[51]

In Home Insurance Company v. New York[52] a tax on corporate franchises in the state or of a corporation of another state doing business in the state, measured by yearly dividends, was held to be valid. The court said: "But the amendment does not prevent the classification of property for taxation, subjecting one kind to one rate and another to a different rate, distinguishing between licenses, franchises and privileges, and visible tangible property and between real and personal property. Nor does the amendment prohibit special legislation. Indeed, the greater part of legislation is special, either in the extent to which it operates or the objects sought to be obtained. And when such legislation applies to artificial bodies, it is no objection if all such bodies are treated alike under similar circumstances and conditions in respect to the privileges conferred upon them and the liability to which they are subjected."

Thus the cases clearly establish a difference between individuals and corporations in respect to taxation.

Inheritance or Legacy Tax.—This taxation has had long and widespread existence. It is not a property tax, but

[51] Telegraph Co. v. Mass. 125 U. S. 530; Butler v. Eaton, 141 U. S. 240; State Railroad Tax Cases, 92 U. S. 575; Railroad v. Backus, 154 U. S. 439.

[52] 134 U. S. 594. Also W. U. T. Co. v. Indiana, 165 U. S. 304.

a premium or tax on the privilege of transmitting estate.[53] An Illinois act taxes inheritances by a progressive process, that is, certain rate on a certain amount of inheritance, a greater rate on a greater amount. It was claimed to violate the Fourteenth Amendment, in denying equality before the law, unjustly classifying and placing unequal burdens on persons inheriting unequal values; but the Supreme Court upheld the act.[54] The subject is fully considered in that case. Not being a tax on property, different rates on different sums of inheritance or legacy would not violate equality or uniformity. It is a tax on a privilege, and under the authorities may be thus classified, and the state may impose conditions, just as it can absolutely, under police power, control, regulate and condition the privilege to make wills of property or its descent. Like license tax, the state may classify, taxing one business more than another, according to amount of business done. If considered a property tax, such different rate would be unconstitutional, I would think, because a man can not be taxed on property of one thousand dollars value more ratably than one owning one hundred dollars. The power to impose such progressive discriminating taxation has been criticised as socialistic and spoliatory, taxing the wealthy, because wealthy, class legislation denying equality before the law, and thus calculated to level property and force communism in it; but under the decisions it is within the power of the states to thus tax without violating the Fourteenth Amendment. Very re-

[53] Schoolfield v. City, 78 Va. 366; Magoun v. Illinois Trust etc. 170 U. S. 288.

[54] Magoun v. Illinois Trust, etc. 170 U. S. 288.

cent decisions sustain it.[55] Many political economists have advocated this graduated or progressive system of taxation on incomes, inheritances and ownership of property according to amount; many oppose it. Likely, the Fourteenth Amendment would forbid discrimination in taxation on purely property valuation. As to incomes, the federal government may, by apportionment among the states, tax incomes. A state may do so, unless its constitution require equality and uniformity of taxation. The state may tax United States bonds and other securities going to legatees or next of kin, because such legacy or inheritance tax is not a property tax, but a privilege to make a will or pass property under intestacy.[56]

Freight Charge, Long and Short Haul.—An act regulating rates on railroads as to long and short haul, prohibiting greater rate for the short than the long haul, held not to be contrary to the Fourteenth Amendment.[57]

If all in like condition are regulated alike, the amendment is not violated.[58]

Partial Police.—Though the amendment does not impair the legitimate and reasonable exercise of the police power by the states, ~~as has been fully shown~~ (p. 168), yet it is equally clear that an ordinance must not be different as to different persons engaged in the same employment under like conditions, else it will violate the equality clause of the amendment.[59]

[55] Plummer v. Coler, 178 U. S. 115, 20 Sup. Ct. R. 829; Knowlton v. Moore, 178 U. S. 41, 20 Sup. Ct. R. 747.

[56] Plummer v. Coler, 20 Sup. Ct. R. 829, 178 U. S. 115; Murdock v. Ward, 178 U. S. 139, 20 Sup. Ct. 775; U. S. v. Perkins, 163 U. S. 625.

[57] Chicago etc. Co. v. Minnesota, 134 U. S. 418.

[58] Railroad Co. v. Mackey, 127 U. S. 205.

[59] Soon Hing v. Crowley, 113 U. S. 703.

Railroad Liability for Negligence.—An act making railroads liable for damages for injury to a passenger, except by reason of his own negligence, though it makes the company liable absolutely, irrespective of the question whether it is guilty of negligence or not, has been held not to deny the equal protection of the law, and valid.[60]

Life Insurance Company.—An act providing that it must pay loss within the time required by the policy, or pay twelve percent damages and attorney's fee, held no denal of equal protection of the law, contrary to the Fourteenth Amendment.[61]

Jury Challenges.—A statute giving to the state in cities of certain population more challenges to jurors than were accorded to the state elsewhere was held not to deny the equal protection of the law.[62]

State Courts and Procedure.—State courts may be arranged, jurisdiction fixed, their procedure fixed, the effect of their judgments declared, and one law made operative in one section of the state, another in another section, without its being considered denial of equal protection under the amendment, if the legislation touching the same be applicable to all alike under like circumstances.[63]

Prohibition of Contract.—It may not be amiss, as pertinent to the equality clause of the Fourteenth Amendment, to refer to two cases elsewhere discussed (p. 201), State v. Goodwill[64] and State v. Fire Creek Company,[65] holding

[60] Clark v. Russell (C. C. A.), 97 Fed. 900.
[61] Life Insurance Co. v. Yoakum, 98 Fed. 251 (C. C. A.).
[62] Hays v. Missouri, 120 U. S. 68.
[63] Missouri v. Lewis, 101 U. S. 22.
[64] 33 W. Va. 179, 25 Am. St. R. 863.
[65] 33 W. Va. 188, 25 Am. St. R. 891.

void, as class legislation, statutes prohibiting owners of coal-mines and manufacturers from issuing orders on stores in payment of wages, and prohibiting them from selling goods to employees at greater percent of profit than in sales to others. The case of State v. Peel Splint Company,[66] as published, contains contrary doctrine in the syllabus; but that syllabus is no law in West Virginia, and the books are in error in publishing the case as law in West Virginia, because the court, composed of four judges, was equally divided, and the case furnishes no law in West Virginia, and does not at all overrule the solid doctrine propounded in the two cases of anterior date just cited. The acts involved in the Peel Splint Company Case prohibited corporations or persons from paying wages in orders on stores or scrip not redeemable in money, and required coal to be weighed to ascertain wages for its digging before the coal should be screened. Two of the four judges held the legislation to be unconstitutional as class legislation; two held the legislation valid. It should be observed that the enactment passed on in the earlier cases was limited to coal operators, while that passed on in the Peel Splint Case applied to all persons. The author in the latter case was of opinion that this distinction did not relieve the legislation involved in it from the objection that it deprived of liberty of contract and action.

Validating Void Contracts.—A statute making good and valid prior loans by foreign corporations does not deprive of property without due process, or impair a contract con-

[66] 36 W. Va. 802, 15 S. E. 1000.

trary to the federal Constitution or deny equal protection.[67]

A corporation pleaded that its contract was *ultra vires* and void, and it obtained judgment in its favor upon that defense. An act of the legislature was then passed validating that contract. It was held that the act did not deprive the corporation of its property without due process or deny it equal protection of the law, and that the act was valid, constitutional legislation in the exercise of lawful legislative power over corporations.[68] The cases seem to hold that the legislature has more power to legalize contracts of corporations by retroactive acts than it has in the case of contracts by private individuals. If the question were *res integra,* it might be open to doubt. There is also a general doctrine found in the cases that the legislature may, by retroactive act, cure defects and irregularities in deeds, contracts, etc., which it might, by legislation in advance, dispense with. The law as to curative statutes found in the books lays down this proposition.

Usury by Building Associations.—Upon the theory that such associations are mutual associations, for mutual benefit of members, *quasi* partnerships, so that payment of the interest and premiums, though exceeding in the running time of the loan lawful interest, redound to the interest of the party himself, many decisions go to exempt them from the defense of usury;[69] but I think it may be

[67] Gross v. U. S. Mortgage Co. 108 U. S. 477.

[68] Steele Company v. Erskine (C. C. A.), 98 Fed. 215.

[69] Reeve v. Ladies' Association, 56 Ark. 335; Barker v. Bigelow, 15 Gray 130.

stated that but for the statutes found in most states exempting building associations from the defense of usury, they would be subject to it.[70] These statutes have generally been held constitutional, and I suppose there can be little doubt of this, considerad alone under the state constitutions. I have not, however, seen any case where it was considered whether the acts referred to deny to borrowers the equal protection of the law contrary to the Fourteenth Amendment. The cases consider the matter under the prohibition found in some state constitutions against special or local as distinguished from general laws—a different question from that suggested under the Fourteenth Amendment. One case does consider it under a state constitution prohibiting acts granting "special or exclusive privilege or franchise."[71] That clause more nearly resembles the question upon which I have doubts, and the case held the exemption from the defense of usury valid. That case involved the question whether a special privilege could be granted. The question which I put is, Does this exemption, by depriving a certain class of borrowers of the protection afforded by the law against usury, leaving to other borrowers its benefit, deprive them of the equal protection of the law, contrary to the Fourteenth Amendment? Man has always enjoyed the protection of the law forbidding usury ever since Moses proclaimed the law of God, "If thy brother be waxen poor and fallen in decay with thee, then thou shalt relieve; yea though he be a stranger, or sojourner, that he may live with thee.

[70] Pfeister v. Wheeling, etc. 19 W. Va. 676.

[71] Vermont, etc. Co. v. Whitehead, 2 N. Dak. 82, 35 Am. & Eng. Corp. Cas. 250.

Take thou no usury of him, or increase, but fear thy God, that thy brother may live with thee. Thou shalt not give him thy money upon usury, nor lend him thy victuals for increase." The Church in the Middle Ages utterly condemned all usury, even the slightest interest. Usury once meant any percent, all percent of increase; now it means interest above legal rate. This prohibition against usury continues to be law today. These usury laws have in all ages been deemed by lawgivers as wise and salutary for the millions of people, and those who enjoy them today number millions. Those laws were made to protect the needy, the unfortunate, the failing, the poor, from oppressions and undue exaction, to save the very homes of the people, to secure their peace and happiness. They are laws made for the public weal, for the protection of which laws all alike may call. They are not like laws classifying different persons engaged in differing business for purposes of taxation and police, but are laws applicable to millions. Those who today do not need them may sadly need them to-morrow. Those laws can not be said to apply only to a class specially circumstanced. They are for all. If this can be said of any laws, this protective feature, it can be said surely of the anti-usury laws. The statutes exempting building associations from the application of the law against usury not only favor these building associations over all other lending corporations and persons, thus being class legislation in favor of one class, but, what is more serious, they take from a certain class of debtors the equal protection of laws made for all in debt, leaving their benefit to all other debtors. Is this classi-

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fication justifiable as one called for by any public need or policy? Is it to meet a public general want? Was it made that the public at large might be benefited? I do not see it plainly in that light. If these questions can not be answered in the affirmative, the Fourteenth Amendment, by its equality clause, must declare these statutes releasing building associations from the defense of usury void. I have been lately led to doubt them, under this equality clause of that amendment. The Maryland court held that the legislature can not allow a certain class of corporations to loan at a higher rate of interest than others.[72]

Weekly Payment of Wages.—Legislation requiring railroad corporations to pay wages weekly, making them a lien, with attorney's fee, was held not violative of the equal protection clause of the Fourteenth Amendment, and not to take property without due process of law.[73]

State Court Decisions.—When one has had a fair trial in a state court, and his rights are measured by laws alike applicable for all, though he be deprived of property by adverse result of the trial, the proceeding is due process under the Fourteenth Amendment. The fact that a railroad is by the judgment held liable for damages for cutting off access to an adjoining lot to and from the street, whereas the owner is denied damages for injury from the construction of a railroad by the company on its own ground on the other side of the street, is no denial

[72] Citizens' Security Co. v. Wheeler, 48 Md. 455.
[73] Skinner v. Garnett Co. 96 Fed. 735.

of the equal protection of the law, contrary to the Fourteenth Amendment.[74]

One convicted of murder in a state court was sentenced, and the judgment was affirmed by the state Supreme Court, that court fixing another day for the execution of the sentence. After the term he asked to amend the record to show that he was not present in the appellate court when the affirmance of his sentence was made, but the court refused to amend, because the term had closed. The law of the state thus announced by its court was applicable to all alike, and its enforcement against the accused was held no denial of the equal protection of the laws.[75]

Taxation of Rolling Stock.—An act distributing for taxation the rolling stock of railroads among several counties on their lines and there taxing it, instead of taxing it at the place of location of the chief office of the railroads, as in case of other corporations and individuals, was held no denial of equal protection contrary to the Fourteenth Amendment.[76]

Foreign Corporations not Within the Jurisdiction of the State, not doing business there, may be denied participation as a creditor of a corporation of that state in its assets, and preference may be given to citizens of that state in such assets of such insolvent corporation. The foreign corporation is, as a corporation, not a citizen of the state incorporating it, so as to claim the same right given by

[74] Marchant v. Pennsylvania Co. 153 U. S. 380; Central L. Co. v. Laidley, 159 U. S. 103.

[75] Fielden v. Illinois, 143 U. S. 452.

[76] Columbus, etc. Co. v. Wright, 151 U. S. 470.

the state to its own citizens under Article 4 of the federal Constitution, and though a corporation is a "person" under the Fourteenth Amendment, yet it is not "within the jurisdiction" of the state so as to be protected by the amendment. This was held to be no denial of equal protection of the laws.[77] But the case cited holds that such preference of home creditors would not be valid against non-resident natural persons, but would be against said Article 4.

Bail Arrest.—One who is bail for another may arrest a prisoner in or out of the state, and it is due process under the Fourteenth Amendment. This was a common law right or power before the amendment.[78]

Innkeepers' Lien.—Statute giving it does not take property without due process of law, or deny equal protection, as it does not take the property, but only fixes a lien on it, and was so, though the act did not say how the lien should be enforced.[79] I would remark, as another reason for this decision, that the lien was an old common law lien before the amendment, and that its adoption could not impair such lien. The case says that samples owned by a merchant, in the hands of his traveling agent are liable to such lien.

Eight-Hour Law.—A statute provided that eight hours per day should be the limit for work in underground mines. A very notable case arose under this statute, Holden v. Hardy.[80] The statute was assailed as taking

[77] Blake v. McClung, 172 U. S. 239; Sully v. Amer. Nat. Bank, 178 U. S. 289, 20 Sup. Ct. 935.

[78] *In re* Von Der Ahe, 85 Fed. 959.

[79] Brown Co. v. Hunt (Ia.), 39 L. R. A. 291.

[80] Holden v. Hardy, 169 U. S. 366.

property without due process of law and denying equal protection of the law and liberty of contract; but the court held that the act was not obnoxious to such objections.

Use of Property on Certain Streets.—An ordinance prohibiting the use of property for any business on certain boulevards was held to be violative of the Fourteenth Amendment, as taking property without due process of law, as the use of property should be regarded as property itself, and not to be arbitrarily taken away, and that the ordinance denied equal protection.[81]

Anti-trust Law.—An act prohibiting combinations in restraint of trade, "except agricultural products and live stock while in the hands of the producer," was held void as denying the equal protection of the law.[82]

Unequal Tolls.—An act reducing tolls on a particular turnpike below other turnpikes under general law was held to be not necessarily a denial of the equal protection of the laws.[83]

Unequal Taxation.—The taxing power is very great in a state, as elsewhere shown (p. 148); but it must not be legally unequal and partial. Any assessment of taxes that gives the party any means of contesting its validity or amount, either before the amount is determined or to contest subsequent proceedings for collection, is due process in such case, and not unequal.[84]

"To bring state taxation within the provision relating to due process of law the case must be so clearly an ille-

[81] St. Louis v. Dorr, 41 S. W. 1094.
[82] *In re* Grice, 79 Fed. 627.
[83] Covington v. Sandford, 164 U. S. 578, 17 Sup. Ct. 198.
[84] Winona, etc. v. Minnesota, 159 U. S. 537.

gal encroachment upon private rights that it is really spoliation." [85]

But such taxation must make all equal before the law, that is, the law of taxation. It can not discriminate between residents and non-residents, taxing either more than the other, or on subjects not taxed to the other.[86]

It is clear that a state or a municipal corporation by state authority may impose different rates of taxation on different subjects, without violating the equality clause of the Fourteenth Amendment. It has the power of classification, if the classification applies to all in like circumstances.[87] But we must be careful to see whether the state constitution limits this power of classification. Many constitutions, like that of West Virginia, say that "taxation shall be equal and uniform throughout the state, and all property shall be taxed according to its value, to be ascertained as directed by law." This requires the same rate on all property. This is the just rule of equal and uniform taxation, and where uniformity is required, a departure from it renders the tax void, it being a denial of equality before the law of public burdens.[88] Where there is no such restriction in state constitutions, the legislature is not bound by this uniformity doctrine; it can tax one kind of property at one rate, another at another rate, or select particular subjects only for taxation. But

[85] Henderson Bridge Co. v. City, 173 U. S. 592, 19 Sup. Ct. 553.

[86] Ward v. Maryland, 12 Wall. 418; Crandall v. Nevada, 6 Wall. 35.

[87] Bridge Company v. County, 41 W. Va. 658; Cooley, Con. Lim. 514; Note 3 Am. & Eng. Corp. Cas. 469; Reyman Co. v. Brister, 179 U. S. 445, 21 Sup. Ct. 201.

[88] New Orleans v. Kaufman, 29 La. Ann. 283; Zanesville v. Richards, 5 Ohio St. 589; 3 Am. & Eng. Corp. Cas. 469, note.

we must remember that even where there is a requirement of equal and unifrom taxation according to value of property, it does not apply to licenses or permits to carry on callings. One of these may be taxed one price, another, another; one town may tax the same calling one price, another town another price.[89]

Telegraph, Telephone and Express Companies.—A statute providing that taxable value of the property of telegraph, telephone and express companies shall be determined with reference to the value of the entire capital does not deny the companies the equal protection of the law, nor is it open to the objection that such taxation is upon property out of a state.[90]

An act giving a bank right to elect to collect from stockholders and pay a state tax of eight mills on the dollar par value, instead of four mills on the dollar actual value, does not deny equal protection of the law.[91]

Taxation Exemption.—It is the unquestionable power of a state to classify property and callings for taxation, and this carries along with it the power to exempt what it chooses.[92] But here again we must look to see, so far as state law is concerned, whether there is a provision like that in the West Virginia constitution quoted above, re-

[89] Slaughter v. Com. 13 Grat. 767 and citations in 3 Am. & Eng. Corp. Cas. 468; Cooley, Con. Lim. 496; Phenix Co. v. State, 72 Am. St. R. 143.

[90] Sandford v. Poe, 37 U. S. App. 378; Adams Express v. Ohio, 165 U. S. 194.

[91] Merchants' Bank v. Commonwealth, 167 U. S. 461.

[92] Rice v. Railroad, 1 Black 358; Charles Bridge v. Warren, etc. 11 Pet. 420; Providence Bank v. Billings, 4 Pet. 514; Jefferson Bank v. Skelly, 1 Black 436; Town of Danville v. Shelton, 76 Va. 325; 3 Am. & Eng. Corp. Cas. 458; 18 Am. & Eng. Corp. Cas. 25, 469; Cooley, Con. Lim. 514; Williamson v. Massey, 33 Grat. 237.

quiring uniformity of taxation and all property to be taxed; for if there is, none can be exempted, as shown by the able opinion of Judge Johnson in the case of Chesapeake & Ohio R. R. Co. v. Miller, Auditor.[93]

The exemption must be clearly expressed. Every presumption is against it.[94]

A municipal corporation can make no exemption from taxation of property which is made taxable by it by state law, as the municipal corporation can only do those things which state law allows, and can not do things forbidden by such law.[95]

Delegation of Taxing Power.—A state legislature may delegate to municipal corporations, counties, school districts, townships and other subordinate agencies the power of taxation consistently with due process and the equality clause of the Fourteenth Amendment.[96]

Irregular Taxation can be cured by act operating retrospectively. The legislature could have authorized the taxation in such mode in advance, and hence can cure it by retrospective act.[97]

Municipal Taxation.—The grant of power to a municipality is not a contract conferring a vested right on the

[93] 19 W. Va. 408.

[94] Railway v. Lafton, 96 U. S. 564; Erie Company v. Pa. 21 Wall. 498; People v. City, 18 Am. & Eng. Corp. Cas. 28; Lancaster v. Clayton, 18 Am. & Eng. Corp. Cas. 31 and full n. 35.

[95] Whiting v. West Point (Va.), 38 Am. & Eng. Corp. Cas. 206.

[96] Martin v. School District (S. C.), 35 S. E. 517; State v. Smith, 18 Am. & Eng. Corp. Cas. 36; City of Richmond v. Richmond & D. Co. 21 Grat. 604.

[97] Thompson v. Lee Co. 3 Wall. 327: Astor v. New York, 62 N. Y. 580; Butler v. Toledo, 5 Ohio St. 225.

municipality, and the legislature may withdraw or modify the power as it chooses.[98]

This doctrine results from the principle that state power over municipal corporations and other subdivisions of its territory is well-nigh unlimited, unless the constitution of the state restrains the legislative powers. Therefore, the legislature can make them, amend them, unmake or dissolve them; it can validate their void contracts, and thus put burdens on them which but for such legislation they would be free from.[99] Under this principle such municipal corporations can not say that they are deprived of property without due process, or denied the equal protection of the law, contrary to the Fourteenth Amendment. But we must look to the state constitution; for it may give rights to these municipal corporations, may give them existence and attributes, which the legislature can not destroy.

Habitual Criminals—Heavier Punishment.—Statutes imposing heavier punishment upon convicts upon second conviction of crime are neither *ex post facto* nor do they deny the equal protection of the laws, as they are reasonable classifications of people for governmental administration, and operate on all alike so situated.[100]

Preferred Liens.—A Virginia statute, giving a lien to persons furnishing supplies to transportation, mining and manufacturing companies, in preference to other liens,

[98] Williamson v. State, 130 U. S. 189; 32 Am. & Corp. Cas. 663; City of Richmond v. Richmond & D. Co. 21 Grat. 604.

[99] Williamson v. Eggleson, 170 U. S. 304; Kelly v. Pittsburg, 104 U. S. 78, 81; Steele Co. v. Erskine (C. C. A.), 98 Fed. 215.

[100] McDonald v. Commonwealth, 173 Mass. 322; Moore v. Missouri, 159 U. S. 673.

was assaulted as contrary to the Fourteenth Amendment, as special class legislation; but the act was held valid.[101] The court said that the act was special legislation, but applied to all in like condition, and was justifiable under the police power.

Payment in Advance for Labor.—A South Carolina act made it a misdemeanor to receive pay or supplies for labor on farms in advance, and then fail to perform such labor. The act was held not discriminative and unequal, but valid.[102] But an act in the same state made it an indictable offense for either party to violate a contract between the land-holder and employee for labor; it fixed a punishment for the land-holder, but contained no fixed punishment for the laborer. This act was held unconstitutional for such discrimination.[103]

Separate Cars for Colored Persons.—We have elsewhere seen that state law requiring separate cars for colored persons does not violate the Fourteenth Amendment as against the colored people. But does it as against the railroad companies? Does it deny them equal protection of the law? It has been held that it does not.[104]

Women Jurors.—Does the exclusion of women from juries violate the equality clause of the Fourteenth Amendment? We have seen, in referring to the case of Strauder v. West Virginia,[105] how vital the Supreme Court of the United States has considered the right of the citizen to sit upon juries. State law excluding colored

[101] Virginia Devel. Co. v. Croz. I. Co. 90 Va. 126.

[102] State v. Chapman, 34 S. E. 961.

[103] State v. Williams, 10 S. E. 876.

[104] Chesapeake & Ohio R. Co. v. Com. (Ky.), 51 S. W. R. 160, 179 U. S. 388.

[105] See page 326 (of this book).

persons from jury service was held to violate the Fourteenth Amendment.[106] It rendered a conviction of murder void. Is a verdict against a woman void because of the state law excluding women from juries? At common law women had no right to sit on juries, and juries did not include them, except upon a writ *de inspiciendo ventre*, a jury to test pregnancy.[107] Their exclusion does not violate Amendment Fourteen on a trial of a man, but it was not decided as to a trial of a woman.

Emigrant Agents' Tax.—An act taxing emigrant agents is not a violation of the privileges and immunities of a citizen of the United States under the Fourteenth Amendment, nor does it deny them the equal protection of the laws.[108]

Time for Appeal from Railroad Board.—An act fixing time for appeal in proceedings arising under "the provisions of this act," an act regulating powers of a board of control over railroads, was held not to be in violation of the Fourteenth Amendment, providing for equal protection of the laws.[109]

Peddlers Without License.—An act prescribing a penalty for peddling without license, specifying some articles which might be peddled without license, was held not to violate the Fourteenth Amendment, as the act did not discriminate between citizens, but left all alike selling those things, the act only discriminating under the taxing power as to the things requiring license.

[106] Strauder v. W. Va. 100 U. S. 303.
[107] McKinney v. State, 3 Wyoming, 719.
[108] Williams v. Fears, 35 S. E. 699, 179 U. S. 270, 21 Sup. Ct. 129.
[109] State v. Jacksonville Terminal, 27 So. R. 221.

Livery-Stables in Cities.—An ordinance of a city allowing four livery-stables in the business center of a city, while the fifth and all others thereafter established should be relegated and confined to a locality remote from such center, was held void as unjustly discriminating between livery-stable keepers.[110]

Prostitutes.—A city ordinance prescribing limits for their residence not contrary to Amendment as to property-owners in such limits, likely not as to prostitutes.[111]

EXCLUSIVE CHARTERS, GRANTS, CONTRACTS.

This subject deserves fuller consideration than has been given it on pages 136, 137. As there stated, on numerous authorities there given, there is no question, under many decisions, that an exclusive charter, grant or contract to carry on a lawful business, containing provisions for exclusive privileges of value to the grantee, where such exclusive grant or privilege is contained in the charter, grant or contract, so as to be, when accepted and acted upon by the grantee, considered a contract, an essential part of the transaction moving the grantee to accept it and invest his money on its faith, is protected as a contract by the federal constitution, Art. 1, Sec. X, and being a valuable franchise or privilege, increased in value by the exclusive right, it is vested property protected by the Fourteenth Amendment. I apprehend there could be no question of its being property, both from its nature and because rights under a contract are property. The Circuit Court of Appeals held it property under the pro-

[110] Town v. West, 27 So. R. 53, 52 La. Ann. 526.
[111] L'Hote v. New Orleans, 177 U. S. 587, 20 Sup. Ct. 788.

tection of the Fourteenth Amendment in Pike's Peak Power Company v. City of Colorado Springs.[111] Franchises have always been regarded as property. Such exclusive charter is denominated as property in The Binghamton Bridge,[112] where the court said: "The constitutional right of one legislature to grant corporate privileges and franchises, so as to bind and conclude a succeeding one, has been denied. We have supposed that if anything was settled by an unbroken course of decisions in federal and state courts, it was that an act of incorporation was a contract between the state and stockholders. All courts are estopped at this day from questioning the doctrine. The security of property rests upon it, and every successful enterprise is undertaken in the unshaken belief that it will never be forsaken." It was held that an act giving a charter to build a toll bridge, with a clause that it should be unlawful for anyone else to erect one within two miles, was a contract inviolable by the state, though it did not fix a limit for the duration of the charter. This doctrine was first settled in the great case cited so often and through so many years—the Dartmouth College Case.[113] In New Orleans Gas Company v. Louisiana Light Company[114] this doctrine is held with continued emphasis in the decision that a legislative grant of exclusive right to supply gas to a city, the right being incorporated in the grant on the consideration of the com-

111 105 Fed. 1.

112 3 Wall. 51, 73. So in Pearsall v. Great N. Co., 161 U. S. 661.

113 4 Wheat. 518.

114 115 U. S. 650. So New Orleans Water Works v. Rivers, 115 U. S. 674.

pany erecting the works, is, after perfomance, a contract protected by the Constitution in that clause inhibiting a state from making any law impairing the obligation of a contract. In numberless cases this principle of the Dartmouth College Case, that a charter is a contract between a state and the corporation, which the state can not impair, has been recognized. In Stone v. Mississippi[115] it is said to have become so imbedded in the jurisprudence of the United States as to make it to all intents and purposes a part of the Constitution itself. In another case,[116] the doctrine is called "a canon of American jurisprudence." Instances of exclusive grants protected are many.[117] The Slaughter-House Cases[118] hold such charters not repugnant to the Amendment. The Dartmouth College Case, thus immovably established, has been doubted as to the correctness of its principle as an original question, and very much lamented, and properly so. It chains the power of the states, and deprives them of capacity to legislate for the good of their people as changing times and conditions may demand. Charters of exclusive privilege were given in the early days of the country, when internal improvement was limited, and the people poor, in the great desire to promote the development of the country, which charters in later days are found to be disastrous to the public weal, which should

[115] 101 U. S. 814.

[116] Pearsall v. Great N. Co., 161 U. S. 660.

[117] Covington Bridge Co. v. Kentucky, 154 U. S. 204; St. Tammany Water Co. v. N. O. Water Works, 120 U. S. 64; Walla Walla City v. Walla Walla Water Co., 172 U. S. 1; Crenshaw v. Slate River Co., 6 Rand. 215; Los Angeles v. Los Angeles Co., 177 U. S. 558.

[118] 16 Wall. 36.

always be paramount to mere individual or private interests. These exclusive privileges foster great corporations of monopoly. Even a patent right is a monopoly, in many respects hurtful; but that is legitimated by the national Constitution, Art. 1, §8, clause 8, to promote science and useful arts. Considerations such as those just indicated led the courts to restrain these exclusive charters or grants within the narrowest possible limits consistent with reason, and the courts have been alert and astute to find exceptions to the doctrine of the Dartmouth College Case. To warrant the application of the rule that an exclusive charter is a protected contract and property, there must be a contract deducible from the statute or ordinance claimed to give the exclusive right. In Stone v. Mississippi[119] Chief-Justice Waite, after admitting the authority of the Dartmouth College Case, said: "In this connection, however, it is to be kept in mind that it is not the charter that is protected, but only any contract the charter may contain. If there is no contract, there is nothing in the grant on which the Constitution can act. Consequently, the first inquiry in this class of cases always is, whether a contract has in fact been entered into, and if so, what its obligations." We may say, virtually, that the very letter of the act must breed this contract, else the courts will deny it. Take the case of Stein v. Bienville Water Company[120] holding a contract with the City of Mobile, granting the sole privilege of supplying the city with water for a term of years

[119] 101 U. S. 814. So New Orleans v. N. O. Water Co., 142 U. S. 79.

[120] 141 U. S. 67.

from a certain creek, not impaired by a contract with another company to supply the city with water from a different source. A very strict construction. We might think the first contract meant an exclusive right to supply the city with water, not to be infringed by a right granted to another company to bring it from another source. The case shows a leaning against monopoly. It distinguishes that case from the St. Tammany Case,[121] which was a grant to supply water from any source.

It will not do for a corporation or person claiming this sole right to cite the general law of a state in force at the time of the grant giving in some way exclusive right, as for instance, that no ferry or bridge right should be granted within a certain distance of another toll ferry or bridge. In a general act of Virginia was a provision that no ferry should be granted within a half mile of another, and it was held that this was general legislation, subject to repeal, and did not tie the hands of the state from granting another ferry right within that distance. There was no contract.[122] Another case[123] holds precisely similar doctrine. In Salt Company v. East Saginaw[124] it was held that an act giving a bounty on salt manufactured in Michigan, and exempting property used in its production from taxation, made no contract, and that the act was only a general law liable to repeal at any time.

And here we must, in every case, remember a dominant rule, laid down in several cases, but emphatically in

[121] 120 U. S. 64.
[122] Williams v. Wingo, 177 U. S. 601.
[123] Belmont Bridge v. Wheeling, 138 U. S. 287.
[124] 13 Wall. 373.

Pearsall v. Great Northern Company:[125] "Such limitations upon the power of the legislature must be construed in subservience to the general rule that grants by the state are to be construed strictly against the grantees, and that nothing will be presumed to pass except it be expressed in clear and unambiguous language. As was said by Mr. Justice Swayne in Fertilizing Company v. Hyde Park, 97 U. S. 659, 666, 'The rule of construction in this class of cases is that it shall be most strongly against the corporation. Every reasonable doubt must be resolved adversely. Nothing is to be taken as conceded but what is given in unmistakable terms, or by implication equally clear. The affirmative must be shown. Silence is negation, and doubt is fatal to the claim. This doctrine is vital to the public welfare. It is axiomatic in the jurisprudence of this court.' Hence, an exclusive right to enjoy a franchise is never presumed, and unless the charter contains words of exclusion, it is no impairment of the grant to permit another to do the same thing, although the value of the franchise to the first grantee may be wholly destroyed." I refer to the opinion of Justice Brown in that case as valuable in presenting the rule and its limitations as stated in numerous cases cited by him, and instances, which it would be out of place to elaborate here, as I seek only in this work, as its general object, to state main principles pertinent to the Fourteenth Amendment. In Central Railroad v. Wright[126] is a later

[125] 161 U. S. 647. See Newton v. Commissioners, 100 U. S. 548; Louisville v. Bank, 174 U. S. 439; Hamilton Gas Co. v. Hamilton, 146 U. S. 258.

[126] 164 U. S. 327.

announcement of the same rule. The case of Ford v. Delta, etc. Company[127] contains a lucid presentation of the subject, and evinces a trend against such exclusive privileges in holding to the rule of the most strict construction of the provision of privilege or exemption. It further holds the important doctrine that an exemption from taxation of railroad property applies, not to all that the company may own, but only to that used in its corporate business; and further that such exemption clause does not relieve from assessments for local improvements.

MUNICIPALITY CONTRACT OR GRANT.

There can be no question of the power of a municipal corporation to make an exclusive grant carrying with it the same immunity from harmful invasion as a grant direct from the legislature.[128] But the same rule that it must be expressed in the grant, as has just been stated as to legislative grants, here applies. And, further, such municipal grant is void, and is neither contract nor property protected by the federal Constitution, unless the municipality had the power by law to make the grant.[129]

Reservation of right to alter or repeal charter.—So hurtful became, in process of time, the rule of the Dartmouth College Case that, following the suggestion of Justice Story made in it, the states frequently adopted the course of inserting in charters granted by them a clause reserving

[127] 164 U. S. 662; Shelby Co. v. Union Bank, 161 U. S. 149.

[128] Pike's Peak Power Co. v. City of Colorado Springs, 105 Fed. 1.

[129] Walla Walla City v. Walla Walla Water Co., 172 U. S. 1; Clarksburg Electric Co. v. City of Clarksburg, 47 W. Va. —; 35 S. E. 994; New Orleans v. N. O. Water Co., 142 U. S. 79; Hamilton Gas Co. v. Hamilton, 146 U. S. 258.

right to alter or repeal the charter, or sometimes incorporated in their constitutions or general corporation statutes such reservation. In such cases the exclusive grant confers no contract right or vested property right that is beyond alteration or repeal, and the federal Constitution would not be violated by repeal or alteration. Such reservations, being protective and conservative of public right, are construed liberally in favor of the state.[130]

Repeal without reservation in charter.—Though when an exclusive charter or grant has been accepted and the expenditure involved in it made, it is a contract and property protected by the Fourteenth Amendment, as well as by article 1, section 10, of the Constitution, nevertheless until such performance of the work of the charter, until some expenditure has been made upon its faith, the charter or grant may be repealed or altered, since until then there is no completed contract or vested property. It seems that mere acceptance will not, in such case, do.[131]

Public corporations.—The law above stated as to exclusive grants to private corporations or individuals has no application to public corporations instituted as agencies of the state in the exercise of government, such as cities, towns, counties and townships. The legislature has full

[130] Citizens' Bank v. Owensboro, 173 U. S. 636; Spring Valley Co. v. Schottler, 110 U. S. 347; Railway Company v. Philadelphia, 101 U. S. 528; Holyoke Co. v. Lyman, 15 Wall. 500; Hamilton Gas Co. v. Hamilton, 146 U. S. 258; Yeaton v. Bank, 21 Gratt. 593; Louisville v. Bank, 174 U. S. 439; Looker v. Maynard, 179 U. S. 46; 21 Sup. Ct. 21.

[131] Walla Walla City v. Walla Walla Water Co., 172 U. S. 1; Bridge v. U. S., 105 U. S. 470; Pearsall v. Great N. Co., 161 U. S. 646, 648; Pike's Peak Power Co. v. City of Colorado Springs, 105 Fed. 1.

power over them; their rights are not contract or property rights protected by the Constitution.[132]

Eminent Domain.—We must not understand that these exclusive grants, charters or franchises are above and free from the power of the state under the right of eminent domain. No property right is violated thereby contrary to the Fourteenth Amendment, or contrary to the contract clause, because neither impeaches the power of the state existing before that contract clause or the Fourteenth Amendment existed.[133]

Tax exemption.—Akin to exclusive charters or grants to individuals and corporations is the subject of such charters or grants to individuals or corporations containing exemption from taxation. Such tax exemption clauses have been frequently held to be binding on the states, so as to forbid them from withdrawing or modifying the exemption. The exemption is a contract protected by section 10, article 1, of the federal Constitution. It is also property protected by the Fourteenth Amendment, because in compelling payment of taxes without law, against law, property is improperly taken and, therefore, taken against the due process clause.[134] There have been able protests against this disastrous doctrine of the power of a legis-

[132] Dartmouth College Case, 4 Wheat. 518; Newton v. Commissioners, 100 U. S. 549; New Orleans v. N. O. Water Works, 142 U. S. 79, 89.

[133] West River Bridge Co. v. Dix, 6 How. 507; Monongahela Co. v. U. S., 148 U. S. 312; N. O. Gas Co. v. Louisiana Light Co., 115 U. S. 650, 673.

[134] Stearns v. Minnesota, 179 U. S. 223, 21 Sup. Ct. 73; Pearsall v. Great N. Co., 161 U. S. 646, 647; Citizens' Bank v. Owensboro, 173 U. S. 636; Piqua Branch Bank v. Knoop, 16 How. 369; Asylum v. New Orleans, 105 U. S. 362; Home of Friendless v. Rouse, 8 Wall. 430; Dodge v. Woolsey, 18 How. 331; Illinois C. R. Co. v. Adams, (Jan. 1901), 21 Sup. Ct. 251.

lature to exempt from taxation. Even before the Fourteenth Amendment it may be doubted whether a state could class-legislate thus, making some pay taxes and exempting others, and relieving large taxable values of public duty and burden; but since the Amendment, is it equal protection of the law? Is it consistent with the equality-before-the-law clause? I would question it, as an original proposition; but before the Amendment it had been decided to be within the competency of the legislature. The exemption practically operates to favor the rich, "to make the rich richer, the poor poorer"—a special privilege. Of course, it is not without force to say that people going into costly enterprises on the faith of such exemption seem to deserve consideration; but contrast with their rights the power, which every government ought to have, to legislate for the many unhampered, in such a matter as public taxation, by regard for even the rights of the few. The lofty maxim of the Roman law, of the law of the civilized world, *Salus populi suprema lex est,* could find no fitter application than in this instance. Government depends upon this tax power; it can not live without it. Can a state estop itself by any such contract of exemption? It is conceded that it can not, if its constitution prohibits; but can it on general principles do so? The courts have answered this question in the affirmative; but in several cases Justices Campbell, Miller, Chase and Field entered vigorous protests, as have many state judges.[135]

[135] Piqua Branch Bank v. Knoop, 16 How. 369, 407; University v. Rouse, 8 Wall. 439, 443.

So binding are these exemptions that the states can not change or modify the process of taxation contrary to their provisions, as where the charter allowed a tax of three percent on gross earnings in full of all tax demands, it was held that taxation could not be put on the value of corporate property.[136]

We must, however, remember that this tax exemption is not favored by the courts; that it must be contained in the grant in its letter, or by inevitable implication therefrom; that every presumption is against it; that it can not arise merely because a work is done while a general law is in force exempting such work from taxation, but the exemption must come from the charter or grant, so as to be a contract; that it must be a contract before it can be deemed property under the Fourteenth Amendment. The same principles here apply as those stated a few pages back as to exclusive grants or charters. And we must not forget that such tax exemption can not be upheld if forbidden by the state constitution.[137]

To make such tax exemption binding there must be, as just stated, a complete contract, and that must be on consideration of performing a work of cost, and it can not rest on an exemption existing merely *bene placitum*.[138]

Right to repeal tax exemption.—Just as in case of exclusive grants and privileges stated above, so as to tax exemptions, in the respect that if the exemption is coupled with a right to repeal or alter, or the state constitution or

[136] Stearns v. Minnesota, 179 U. S. 223, 21 Sup. Ct. 73.

[137] Stearns v. Minnesota, 179 U. S. —, 21 Sup. Ct. 73; Chesapeake & Ohio Railway Co. v. Miller, 19 W. Va. 408.

[138] Rector v. Philadelphia, 24 How. 300; Grand Lodge v. New Orleans, 166 U. S. 143, 146.

a general statute antedating the exemption so provides, the legislature may withdraw or modify the exemption.[139]

Exemption from police power.—There can be none. No exclusive charter or grant by a legislature or municipality can withdraw anything from the lawful exercise of the police power, which would otherwise be subject thereto; for that would take from the government that for which it alone exists and is supported by the people—governmental power for law, order, safety of life, limb and property, public health and all other behests of man in organized society.[140] (See pp. 169, 172.)

Exemption from change of rates charged by railroads and others. This is treated of elsewhere (181, 184), but it may be mentioned here as another exception to the rule of the Dartmouth College Case above discussed, which exception is that there can be no exemption in a railroad or other charter granted for business touching the public interest, carried on for the general public, and which the public must patronize, which will deprive the state of power to regulate the rates and charges for such business, since it concerns the police power, is warranted by the police power, just mentioned as an exception from exclusive grants.[141]

[139] Louisville Water Co. v. Clark, 143 U. S. 1; Citizens' Bank v. Owensboro, 173 U. S. 636; Louisville v. Bank, 174 U. S. 439; Spring Valley Co. v. Schottler, 110 U. S. 347; Railway Co. v. Philadelphia, 101 U. S. 528; Holyoke Co. v. Lyman, 15 Wall. 500; Hamilton Gas Co. v. Hamilton, 146 U. S. 258.

[140] Fertilizing Co. v. Hyde Park, 97 U. S. 659; Munn v. Illinois, 94 U. S. 113; N. O. Gas Co. v. Louisiana Light Co., 115 U. S. 650, 672; Beer Co. v. Massachusetts, 97 U. S. 25; Stone v. Mississippi, 101 U. S. 814.

[141] Munn v. Illinois, 94 U. S. 113; Railroad Co. v. Transportation Co., 25 W. Va. 324.

Must be for public purpose.—Can there be an exclusive charter or an exemption from taxation, without any consideration of answering a public purpose, but simply for private business not subserving public ends? Those public ends have been the inspiring motive for these favors, and it is supposed that they must be present in such cases. Such would be the fair import of the cases above cited, and just now I observe that other cases assert as essential to justify an exclusive grant a public end and benefit.[142]

Against these exclusive charters and contracts made for long terms by municipalities giving persons or corporations sole privileges to furnish light, gas, water and the like, and also against tax exemptions, loud protests have been made, and many state decisions have denied their validity; but the holding of the United States Supreme Court sustaining them is paramount and controlling, as these grants involve rights of property under the Fourteenth Amendment and rights under the clause of the federal Constitution restraining states from impairing the obligation of contracts. We must, therefore, at last look to the Supreme Court cases, its many cases, for the standard and test of their validity. As a *res integra* their validity is open to serious question, especially under the development of later days. They foster monopoly, stifle competition, debar persons from equal liberty in the theatre of lawful competition, amass wealth in a few hands, give undue power over production and sale, and undue influence in public affairs and private business.

[142] Slaughter House Cases, 16 Wall. 36; N. O. Gas Co. v. Louisiana Light Co., 115 U. S. 650; Louisville Gas Co. v. Citizens' Gas Co., 115 U. S. 683.

In the Slaughter-House Cases a reason for their validity is stated to be that the English parliament and American legislatures had long exercised the function of making such grants for public good; but it seems clear that all monopolies were condemned by the common law. In 1602 it was so held in Darcy v. Allen.[143] It is difficult to see how contract or property rights can vest under contracts banned by law. In the time of Queen Elizabeth these monopolies greatly afflicted England until declared repugnant to the ancient laws of the realm, as Hume, Macaulay and Blackstone tell us.[144] They afflict America; but the trend of public opinion, and the limitations set up by the courts and legislation, are restrictive of them, and probably no great disaster will result from them.

TRUSTS AND COMBINATIONS.

What is the meaning of the "trusts" here alluded to? Not those trusts so long known to courts of equity, where property is held by a trustee for the benefit of another person, a *cestui que trust;* but the "trusts" here referred to are those so common of late days, so much the subject of adverse and favorable opinion, the subject of discussion in the political arena, and of restrictive or prohibitory legislation by the national and state legislatures. This subject, though it is not intended to minutely consider it, is pertinent to this work for the reason that the question is whether these trusts are against public policy and void at common law; for if they are not, then undue

[143] 11 Coke, 84.
[144] 4 Bl. Comm. 159.

legislation against them violates the liberty clause and the property clause of the Fourteenth Amendment covering the right to contract and engage in business; otherwise it does not. The stockholders in different manufacturing corporations adopted a plan of transferring their certificates of stock to persons constituting a committee of trustees, and these trustees issued to the stockholders certificates of interest—"trust certificates." The trustees got new certificates of stock from the several corporations and controlled their operations, and the profits went to the old stockholders under their stock certificates. Thus these several corporations were combined under one ownership and control, and no longer competed with each other in the production and sale of commodities. What the purpose of this arrangement? Abatement or destruction of competition, limitation of production, if demand declines and prices go down, maintenance or enhancement of prices for articles necessary for public consumption; in short, control of production and prices, control of the market in given lines, and either the destruction of outstanding concerns or their compulsory amalgamation with the combination; and sometimes even with express provision to buy in the stock of other companies. The courts declared such combinations partnerships, and held them illegal, because corporations can only separately carry out the functions assigned by the state, and can not merge in a partnership.[145] The subject, so far as it is repugnant to

[145] People v. Sugar Trust, 121 N. Y. 582, 18 Am. St. R. 843; State v. Standard Oil Co., 49 Ohio St. 137, 34 Am. St. R. 541; Mallory v. Hanauer Oil Works, 86 Tenn. 598; Bishop v. American Preserve Co., 157 Ill. 284, 48 Am. St. R. 317; Distilling Co. v. People, 156 Ill. 448, 47 Am. St. R. 200; National Harrow Co. v. Hench, 83 Fed. 36, 39 L. R. A. 299.

the federal anti-trust law to protect interstate and foreign commerce, is discussed in cases cited in the note.[146]

In some of the cases cited the courts base their condemnation of trusts, not merely on the perversion of charters by engagement in partnership, but went further, widened out the basis of their condemnation by declaring the combinations to be contrary to public policy, because tending to the restraint of trade and competition and encouragement of monopoly, and undue control of production and prices, and forfeited the corporate charter. Later, to avoid the partnership objection, another process was adpted whereby the corporations conveyed their plants to trustees, and they conveyed to a newly organized corporation, which conducted the business in lieu of all and for the benefit of their stockholders, or the several corporations transferred in some way to the new corporation. In some way several corporations competing in production merge into one, and cease competitive production. By means of large capital this new corporation can produce largely, or limit production, lessen supply, enhance prices, and lower the prices of materials used in production. It may be at once said that no matter what the form adopted may be, if the end is to curtail production, enhance prices, restrain trade and competition, control the market in commodities, it is condemned by common law and by many statutes in the different states. The common law, for the avowed purpose of encouraging freedom of trade and production, disabled any corporation from buying

[146] United States v. Freight Association, 166 U. S. 290; United States v. Joint Traffic Association, 171 U. S. 505; Addyston Pipe Co. v. United States, 175 U. S. 211.

out, or leasing for long terms, the franchises and properties of other corporations. Its design was to keep them all going for the public good. The Supreme Court of the United States held that a railroad corporation, unless authorized by its charter or legislative act, can not by lease or other contract turn over to another company for a long period of time, its road and all its appurtenances, the use of its franchises and the exercise of its power, nor can any other railroad company, without such authority, make a contract to run and operate the road, property and franchises of another railroad company.[147] Under this law such combination of corporations would seem to be unlawful and their charters open to forfeiture for misuser. The Chicago Gas Trust Company was incorporated to purchase and hold or sell the capital stock, or purchase or lease, or operate the property, plant, good will, rights and franchises of any gas works or company; but the Supreme Court of Illinois held the incorporation illegal.[148] Such seems to be the general law.[149]

In the late great case of Harding v. American Glucose Company[150] it is held that "any combination of competing corporations, the necessary consequence of which is the controlling of prices, or limiting of production, or suppressing competition, in such a way as to create monopoly, is contrary to public policy and void. An agreement tend-

[147] Pennsylvania Co. v. St. Louis, Alton, etc., Railroad, 118 U. S. 290; Thomas v. Railroad Co., 101 U. S. 71.

[148] People v. Chicago Gas Trust Co., 130 Ill. 268.

[149] Stockton v. Central R. R. Co., 50 N. J. Eq. 52, s. c. p. 489; Houck v. Anheuser-Busch Association, 88 Tex. 184; State v. Nebraska Distill. Co., 29 Neb. 700.

[150] 182 Ill. 551, 74 Am. St. R. 189 (full note.) See 1 Eddy on Combinations, §606.

ing to prevent competition and create a monopoly is void by the principles of the common law, because it is against public policy." The case declared void the sale of the American Glucose Company to a new company, the Glucose Sugar Refining Company, to which several other corporations sold out, and the entire transaction was held void. The opinion contains an elaborate discussion of the trust subject. The case referred to applies the same rule to combinations of labor to affect the price of labor.

Another Illinois case [151] held void an agreement between a labor or trade union and a board of education that in all contracts for public works no labor should be employed but union labor, as stifling competition, making the government discriminate between citizens in public works, and contrary to the guaranty of liberty in the Constitution. The court said that such a legislative act would be void, and so was this contract by a public board representing the state. A later case[152] holds a city ordinance requiring city printing to be awarded only to union shops, or those showing a printers' union label, void as promoting monopoly and restricting the letting to the lowest bidder for the public benefit. A similar city ordinance as that last mentioned was held *ultra vires* in a city council, and as tending to promote monopoly and prevent competition.[153]

The By-laws of the Associated Press Association provided that the members of it should not receive or furnish the regular news dispatches of any other news association

[151] Adams v. Brennan, 177 Ill. 194, 69 Am. St. R. 222, 224.
[152] Holden v. City of Alton, 179 Ill. 318.
[153] City of Atlanta v. Stein, 111 Ga. 789.

covering a given territory, and they were held void.[154] The opposite decision was made in New York.[155]

There are many honest advocates of trusts as not deleterious to, but promotive of, the public interests. Those advocates claim that trusts stimulate enterprise and industry by the union of large amounts of money, under safe management in active development, increasing the employment of labor and enabling the procurement of machinery for the production of commodities at lower cost, and thus lessen the price to consumers, and that they prevent ruinous competition involving citizens owning stocks in industrial corporations in great losses. It is claimed that trusts are unavoidable in these days of immense production, which minor capital can not accomplish, and that they are indispensable to secure to the nation foreign export trade, and without trusts or combinations we could not cope with foreign production. There is no doubt that there is fact in these arguments. These combinations do injury to the body politic, but they also do some good. Whatever we may think in that regard, so far as such combinations are adverse to the state, the courts have disregarded these arguments of public benefit. In the case above mentioned, Harding v. Glucose Company, the court said the reduction of prices made no excuse, as it might be done to crush out small concerns and thus increase prices; and that even if prices were not raised, the true consideration was that the combination enabled the corporation to raise them at its will. Whilst the courts have looked askance on trusts, and have administered heroic

[154] Inter-Ocean Pub. Co. v. Associated Press, 184 Ill. 438.
[155] Mathew v. Associated Press, 136 N. Y. 333.

treatment, in many instances causing their abandonment, they have properly guarded against the denial of the right of legitimate contract and business, or the injury of trade. The legislatures should not destroy the incentive to investment in legitimate enterprise. Legislation so radical as to repress business and commerce will injure the public more than will the trusts. Indeed such legislation could not stand judicial test; still it would harm business interests. The combinations must injure legitimate trade, business and competition to fall under legitimate condemnation.[156] The conservative mean between the conflicting interests is troublesome to attain in legislation and decision; but the public interest is always to be the matter of first consideration. In Addyston Pipe Company v. United States,[157] in construing the Act of Congress "to protect trade and commerce against unlawful restraints and monopolies," the court laid down a very wholesome rule of general application to both inter-state and intra-state commerce in the language that where "the direct and immediate effect of a contract or combination among particular dealers in a commodity is to destroy competition between them and others, so that the parties to the contract or combination may obtain increased prices for themselves, such contract or combination amounts to a restraint of trade in the commodity. Total suppression of trade in the commodity is not necessary to render the combination one in restraint of trade. It is the effect of the combination in limiting and restricting the right of each of the members to transact business in the ordinary way,

[156] Diamond Match Co. v. Roeber, 106 N. Y. 473.
[157] 175 U. S. 211.

as well as its effect upon the volume of dealing, that is regarded. All the facts and circumstances are to be considered in order to determine the fundamental question—whether the necessary effect is to restrain inter-state commerce." In that case, when in the Circuit Court of Appeals, Judge Taft delivered a very valuable and able opinion.[158] The nation has no power over the subject except so far as such trusts may affect inter-state commerce. The case just mentioned concedes full power of the states over trusts, so far as they affect their internal commerce. So it can be said that, regardless of benefits that may accrue from trusts, as the court said as to inter-state commerce, we may say as to intra-state commerce, when the question of the lawfulness of a combination arises, that if its logical, natural, probable effect is to enhance prices, or put it in the power of the combination to do so, or to suppress competition, or prejudice the freedom and naturalness of trade, that combination is unlawful.

INCOME TAX.

What has the Fourteenth Amendment to do with this? If it is an unconstitutional tax, one discriminating between citizens without constitutional warrant, its imposition would be class legislation denying equal protection of the law, taking property without due process. Of course, as the Fourteenth Amendment does not restrain the powers of the National government, but only those of the States, it can have no bearing on federal income

[158] 85 Fed. 271, 46 L. R. A. 122.

tax. But is it a lawful state tax? It is popularly, but mistakenly, thought that the United States Supreme Court has decided against the validity of all federal income tax, and it has received bitter condemnation because of that erroneous understanding. On the contrary, that court has recognized the validity of such tax when apportioned among the states as required by the Constitution, article 1, providing that "No capitation or other direct tax shall be laid unless in proportion to the census," and "Representatives and direct taxes shall be apportioned among the several states which may be included in this Union, according to their respective numbers." Chief-Justice Fuller said that this power in the federal government to levy an income tax by apportionment among the states was "plenary and absolute." [159] The question before the Supreme Court was whether the act of Congress levying an income tax directly on the tax-payer was a direct or indirect tax; for if direct, such levy immediately on the tax-payer, and not mediately by apportionment among the states, would violate the Constitution. It was held that taxes on real estate, being indisputably direct taxes, so were taxes on its incomes from rents, and so on personal property or its income, and not being apportioned among the states the act was unconstitutional. The court held that the power to lay direct taxes was with the states forming the Union, and that they had given up very great powers of taxation to the general government, such as excise and import taxes, but had reserved the power of direct taxation, their main source of support, and

[159] Pollock v. Farmers' L. & T. Co., 158 U. S. 601.

had only given the nation power of direct taxation qualifiedly, that is, by apportionment among the states. Of course, the states possess the power of direct taxation. We may virtually say that all their taxes are direct. It is a sovereign power inherent in them from the beginning, not prohibited to them by the federal Constitution, nor granted to the nation except as stated. This power resided in the states before the Fourteenth Amendment came. It did not affect the power of taxation in the states. (See pages 149,298. Even though, like the late federal act, a man of an income of $4,00 should be taxed on it, and one of less income not taxed, still this would not bring it in opposition to the Amendment declaring that no state shall deny the equal protection of the law, because classification for taxation is usual and lawful. (See pages 337, 341.)

Chapter 17.

RELATIONS OF STATES AND NATION.

It is not designed or necessary to be full or ample upon this subject, but only to go so far as will indicate the construction and application of the Fourteenth Amendment as pertinent to the question following:

HOW CAN THE UNITED STATES ENFORCE THE FOURTEENTH AMENDMENT?

That the Fourteenth Amendment greatly increased the power of the nation over the states by even a temperate construction I have already stated, and is everywhere admitted. Before it came the state could deal with the lives, liberty and property of its people as it chose, without restraint or interference by the nation; there was no power in the nation to challenge any act of the state for want of due process or equality, unless its law was *ex post facto,* attainder, or impaired a contract; but under this amendment the nation may challenge, every person through national instrumentalities may challenge, any state action in these matters as being without due process, or denying the equal protection of the laws, whether that action be by the legislative, executive or judicial

power, if that action impair life, liberty or property without due process, or deny equal protection of the laws, or is alleged to do so. This is clear from the words of the amendment. But how can the nation interfere, that is, by what means, in what mode? And when it does interfere, how far can it go? Great questions, grave questions, to which no fixed answer, except a very general one, can be given; but such general principles can be stated, have been stated, as point the way. Still, there is confusion and indefiniteness, to a considerable extent. Upon these questions hang the fate of the Union. The Union can not exist without the states, and sometimes the states are jealous of the restriction of their powers. It is with that great tribunal at Washington to say finally, to hold the balance adjusted between Nation and States, as so far it has well done.

Let us see, in short space, what were the relations of States and Union before the Amendment, and thence infer what change was likely contemplated by the Amendment. It has been often inaccurately said that the federal government is one of limited powers. It is one of *enumerated* powers, but of unlimited authority within that enumeration. Chief-Justice Marshall said in 1819: "This government is acknowledged by all to be one of enumerated powers. The principle that it can exercise only the powers granted to it, would seem too apparent to have required to be enforced by all those arguments which its enlightened friends, while it was depending before the people, found it necessary to urge. That principle is now universally recognized. . . But the question respecting the extent of the powers granted is perpetually arising.

In discussing these questions the conflicting powers of the general and state governments must be brought into view, and the supremacy of their respective laws, when in opposition, must be settled. If any one proposition could command the universal consent of mankind we might expect it would be this: that the government of the Union, though limited in its powers, is supreme within its sphere of action. . . The government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the Constitution, form the supreme law of the land, 'anything in the constitution or laws of any state to the contrary notwithstanding.'" [1]

Thus it has enumerated powers, not all the powers of a government; but within those enumerated powers, and such implied ones as are essential to execute those enumerated powers, the government of the United States is supreme over states and people. Chief-Justice Chase, for the whole court, said in Lane Co. v. Oregon: [2] "Both the states and the United States existed before the Constitution. The people thought that instrument established a more perfect union by substituting a national government, acting with ample power directly upon the citizens, instead of the confederate government, which acted with powers greatly restricted only upon the states. But in many articles of the Constitution the necessary existence of the states, and within their spheres the independent authority of the states, is distinctly recognized. To them nearly the whole charge of interior regulation is com-

[1] McCullough v. Maryland, 4 Wheat. 316.
[2] 7 Wall. 71, 76.

mitted or left; to them and to the people all powers not expressly delegated to the national government are reserved. The general condition was well stated by Mr. Madison in the Federalist thus: 'The federal and state government are, in fact, but different agents and trustees of the people, constituted with different powers and designated for different purposes.' "

"It is a familiar rule of construction of the Constitution of the Union that the sovereign powers vested in the State governments remained unaltered and unimpaired, except so far as they were granted to the government of the United States. That the intention of the framers of the Constitution in this respect might not be misunderstood, this rule of interpretation is expressly declared in the tenth article of amendments, namely: 'The powers not delegated to the United States are reserved to the states, respectively, or to the people.' The government of the United States can claim no powers which are not granted to it by the Constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication."[3]

Thus it is apparent, and no one denies, that it was, before the Fourteenth Amendment, a function of the state to make laws and administer them, civil and criminal, touching, covering, protecting, forfeiting life, liberty and property. Does the amendment change all this? No one has ever so claimed. Some statements of law quoted above came from the Supreme Court since the adoption of the Fourteenth Amendment, and no qualification of

[3] The Collector v. Day, 11 Wall. 124.

antecedent doctrine in this regard was made.* Volumes more could be quoted in this vein. It is a concessum. "The Fourteenth Amendment was not designed to interfere with the powers of the states to protect the lives, liberty and property of its citizens, nor with the exercise of that power in the adjudication of the courts of the state in administering the process provided by its laws.[4]

"The Fourteenth Amendment in forbidding a state to make or enforce any law abridging the privileges and immunities of citizens of the United States, or to deprive any person of life, liberty or property without due process of law, or to deny to any person the equal protection of the laws, did not invest, did not attempt to invest, Congress with power to legislate upon subjects which are within the domain of state legislation."[5]

In the great *Civil Rights Cases*[6] Justice Bradley, in a great opinion delivered for the court, conceded this proposition. Speaking of the legislation of Congress authorized by the Fourteenth Amendment in its fifth section for its enforcement, he said: "Such legislation can not properly cover the whole domain of rights pertaining to life, liberty and property, defining them and providing for their vindication. That would be to establish a code of municipal law regulative of all private rights between man and man in society. It would be to make Congress take the place of the state legislatures and to supersede them. It is absurd to affirm that because the rights of life, liberty and property (which include all civil rights

[4] *In re* Converse, 137 U. S. 624.
[5] Chief-Justice Fuller *In re* Rahrer, 140 U. S. 554.
[6] 109 U. S. 3, 13.

that men have) are by the amendment sought to be protected against invasion on the part of the state without due process of law, Congress may therefore provide due process of law for their vindication in every case; and that because the denial by a state to any person of the equal protection of the laws is prohibited by the amendment, therefore Congress may establish laws for their equal protection. In fine, the legislation which Congress is authorized to adopt in this behalf is not general legislation upon the rights of the citizens, but corrective legislation, that is, such as may be necessary and proper for counteracting such laws as the states may adopt or enforce, and which by the amendment they are prohibited from making or enforcing, or such acts and proceedings as the states may commit or take, and which by the amendment they are prohibited from committing or taking."

In that case an act of Congress was held void and not warranted by the Fourteenth Amendment, because "it stepped into the domain of local jurisprudence and lays down rules for the conduct of individuals in society towards each other, and imposes sanctions for the enforcement of those rules, without referring to any supposed action of the state or its authorities. If this legislation is appropriate for the enforcement of the prohibition of the amendment, it is difficult to see where it is to stop. Why may not Congress with equal show of authority enact a code of laws for the enforcement and vindication of all rights of life, liberty and property? If it is supposable that states may deprive persons of life, liberty or property without due process of law (and the amendment itself does suppose this), why should not Congress proceed

at once to prescribe due process of law for the protection of every one of these fundamental rights, in every possible case, as well as prescribe equal privileges in inns, public conveyances and theatres? The truth is, that the implication of a power to legislate in this manner is based on the assumption that if the states are forbidden to legislate or act in a particular way, and power is conferred on Congress to enforce the prohibition, this gives Congress power to legislate generally on that subject, and not merely power to provide modes of redress against such legislation or action. The assumption is certainly unsound. It is repugnant to the Tenth Amendment, which declares that 'powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.' " See Justice Field's opinion in *Ex parte* Virginia.[7]

I repeat that upon these and many other authorities it can be safely predicated that, notwithstanding the Fourteenth Amendment, the states still have sole power to make and execute all laws, civil and criminal, covering the subjects of life, liberty and property, to govern all within their jurisdiction, and that it is only when, by any action, they affect life, liberty or property and legal equality without due process of law, the federal government, through its Congress or courts, can intervene. Its powers are only prohibitive, corrective, vetoing, aimed only at undue process of law. But here arises an important question. Notwithstanding all above said as to the character and powers of the federal government before the

[7] 100 U. S. page 360.

Fourteenth Amendment, and notwithstanding the fact that it is only prohibitory, and not a grant of original power of governmental legislation and action to the federal government, like that granted to it as to the regulation of commerce, yet the federal government, by this Fourteenth Amendment, is given a power, not of original legislation and action, but a power to nullify state action, a power which, while not taking away power of action in the states in the first instance over the subjects specified in the Amendment, yet none the less a power enlarging the functions of the federal government over what they were before the amendment came, a power largely detractive from state power in last resort. The federal government has power to counteract action of a state that is without due process, or denies equal protection of the laws. Who has the right to say ultimately what is due process, what is such denial; whether given action of a state is due or undue process, or undue denial of equal protection of the laws? Clearly the national government possesses this power, else the amendment would do no good; if the federal court has to take what the state court says is due process, or is not an unwarranted denial of right, then the Fourteenth Amendment has no mission and performs no office. But who is to say what are the rights of life, liberty and property and person within the state? It might be thought, upon the above authority, as an original question, that this is a state function. Who is to say decisively what is liberty, and what its rights, and what is property: to say whether the right to do a thing is a right covered by the "liberty" right under the amendment, or to say whether a thing is property

under the amendment? It might be thought that this, too, is with the states, and that it is only when that which is liberty or property under state law is taken away or impaired by wrongful process, by action not according to law in its due process, that the federal power can intervene, for it might seem that the amendment is levelled only at that. It might be thought that it was not the design of the amendment to give power to the nation to prescribe what is liberty and its rights, what is property and its rights. If a federal court can say, contrary to a state court, that a personal right claimed by a person is a right of liberty, or that a thing claimed by a person is property, then that federal court would seem to make law defining what is liberty and rights under it, and make law defining what is property in a state. If it can do this in a given case, why does not the principle go further and allow it to pass generally and in every instance on what is a right of person or property in a state? If Congress can not so legislate, a federal court has no wider power under this amendment. Refer back to the holding in the Civil Rights Cases that if Congress can, to any extent, by legislation, define and declare rights of this kind, it may prescribe a full code of law to regulate the intercourse of man with man in society, and not merely correct and nullify state action that is without due process of law. It would seem that if a federal court can define the law by which citizens of a state shall exercise liberty or acquire, hold or lose property, or say what is, what is not a contract or vested property under the law of the state, it thus makes law for the state. If it can say whether a person is deprived of liberty for what is not

a crime by state law, it makes criminal law for the state. If it can say that there is a contract or vested property under state law, when the state court says there is not, the federal court lays down law for the state governing contracts and property, and it simply depends on the number of instances in which it acts to fix the extent of its making law for the state. Is it said that the state court may say that this is not a contract or right or property vested, when in fact in other states it is such? That is no difference; it is the right of the state to do this. It is tested by state law, not law of another state. This power was original in the states. Should a state court say finally whether a right claimed by a person in it under its laws is a lawful right of liberty or property? Was this power meant to be taken away by the amendment? Rights existing under state laws can not be taken away by state action that is arbitrary, undue process, not regular and usual in such case, a process not applicable to all alike in similar circumstances. It is only undue process, action not warranted by the ordinary law that is impeached by the Fourteenth Amendment. Was it meant to go further? Several cases sustain this position. Leeper v. Texas[8] holds that by the amendment the powers of the state in dealing with crime are not limited, except that the state can not deprive persons or classes of equal and impartial justice, and that law in its regular course in the state is due process, and when secured the amendment is satisfied.

The amendment presupposes a right of life, liberty or

[8] 139 U. S. 462.

property already existing under state law, which it protects from undue process prejudicial to the right; but there must be such right before it can call on the amendment for defense. Whence does that right come? It can only come from state law, because the amendment does not originate or confer it, but only defends it from illegal assault. Therefore, it would seem that unless state law recognizes this right of life, liberty, property or equality, there is nothing for the amendment to operate upon; and therefore we must find such right vested under state law. The Constitution says that no state shall pass an *ex post facto* law. A federal court has right to say whether an act is *ex post facto,* because that is the particular thing inhibited. The Constitution says that no state shall pass a law impairing the obligation of a contract. It might seem that a federal court does not say what is an obligatory contract under state law contrary to a state decision, but that the federal court can say whether an act of the state is an impairment of its obligation, for that is the particular thing inhibited. So, it might seem that the federal court does not say what is a right of liberty, what may be done under it, or what is property under state law; but that it can say, of its own judgment, regardless of state judgment, whether the action of the state upon it as undue process, as that is the particular thing inhibited Remember, that the amendment *gives* nothing, except protection to existing right. Hence state decisions as to what are such rights, whether they do or do not exist, are, or ought to be, controlling. I say state decisions as what are such rights, not as to whether the process by which the state may impair them is due proc-

ess; the latter is clearly for federal decision. This doctrine would accord to the states what all concede they had before the amendment, would take nothing from the national power. It would preserve the benefit of local self-government, the dignity of the states as erst it was. It prevents, largely, at least, the very objectionable feature of different courts in the same state propounding the law differently on the same state of facts, and thus promotes symmetry of the system of law. It preserves the Union, because it prevents clash and conflict between state and federal governments. This clash may occur at any time. In the past it has occurred, and it is only dependent upon the public interest and excitment existing at any particular crisis what disaster it may bring. In 1813, in Hunter v. Martin,[9] the Supreme Court of Virginia, denying the right of the United States Supreme Court to entertain a writ of error to its judgment, refused to acknowledge a reversal or to carry out the mandate of the federal Supreme Court, and the latter court reversed the refusal, and itself awarded execution. The clash later between the federal Supreme Court and that of Iowa in the matter of the validity of railroad bonds in Gelpcke v. Dubuque[10] is another instance. Justice Miller speaks[11] of the disagreeable duty he was compelled to perform in following decisions of the federal Supreme Court as a circuit judge, to commit to jail over one hundred citizens of Iowa for disobeying a federal decision, they obeying in good faith an injunction from a state court

[9] 4 Munford, 1; 1 Wheat. 304.
[10] 1 Wall. 175.
[11] Butz v. City, 8 Wall. 587.

—one commanding them to do, the other not to do, a certain thing. Other instances of legal collision have occurred. This doctrine that state decisions control as to the substance of rights under state law, not the procedure affecting them, is not merely a matter of comity between state and nation, but of positive law; for the Judiciary Act of 1789 says: "The laws of the several states, except where the Constitution, treaties or statutes of the United States otherwise provide, shall be regarded as rules of decision in trials at common law, in courts of the United States, in cases where they apply." Why this enactment? Because the laws of the states gave, created, governed life, liberty and property, not laws of the United States, and this being so, deference was to be paid them in federal courts, first, because parties had right to claim or deny title under them; and, second, in order to avoid having conflicting rules of decision in the same state. Now, "the laws of the several states" include state constitutions, statutes, common law and decisions expounding them.[12] It will be obzserved that the statute says that state laws shall be the rule of decision "in trials at common law." It is not to be inferred from this that there is to be in federal courts on the same facts different decisions on property rights in equity and law cases; that is, that the federal courts will follow state courts in the one case and not in the other. It might be so thought from some cases;[13] but I understand those cases to refer

[12] Bucher v. Cheshire, 125 U. S. 582.

[13] Boyle v. Zacharie, 6 Peters 648; Russell v. Southard, 12 How. 139.

to practice, and not to the law of the right of things.[14] But Bucher v. Cheshire, just cited, upholds this distinction. I think that clause means only that it was not designed to infringe on principles of equity governing chancery courts, as the rules in many respects are different. It surely can not mean that a federal court acting in a state in a chancery cause need not follow an equity court of that state in its decisions of equity law on the same facts, but would in a law action, and thus have clashing decisions. But, at any rate, comity, harmony certainly unite to say that in equity cases state decisions on state law should be followed, and such is the universal practice. It may be that some federal decisions do not harmonize with this view; some decisions seeming to go into the field of declaring what the law of the state is, what it should be held to be, contrary to state decisions; but in the main the federal courts do follow this line.

[14] Opinion in Brine v. Insurance Co. 96 U. S. 634.

Chapter 18.

STATE DECISIONS—HOW FAR THEY CONTROL FEDERAL COURTS.

In conformity with principles stated in the last pages it has been again and again held that laws of the state tell in federal courts what is good title to land, and, indeed, to personal property, except under the commercial law, and that state decisions are conclusive thereon.

"This court looks to the law of the state in which land is situated for the rules which govern its descent, alienation and transfer, and the effect and construction of wills and other conveyances." [1]

"The laws of the state in which lands are situated control exclusively its descent, alienation and transfer, and the effect and construction of instruments intended to convey it." [2]

It is perfectly clear that no title to lands can be acquired or passed, unless according to the law of the state in which they are situated. That governs its descent, devise, alienation or other mode of its transfer.[3]

[1] De Vaughn v. Hutchinson, 165 U. S. 566; Clark v. Clark, 178 U. S. 186, 20 Sup. Ct. 873.

[2] Brine v. Ins. Co. 96 U. S. 627.

[3] Clark v. Graham, 6 Wheat. 577; Clark v. Clark, 178 U. S. 186; Abraham v. Casey, 179 U. S. 210.

"The construction of state law upon a question affecting the title to real property in the state by its highest court is binding upon the federal courts" [4] So as to statute of limitations.[5] So with personalty within the state. If a man has title to property in a state, he must look to state law to hold it. He has no other right. If he claim a personal right, a right of liberty, it is likewise. Living in the state, he can do those things which state law allows; he can not do those things which it forbids. He is subject in rights of liberty and property to state law.

It has been through the whole life of the nation held that the construction of state law by the highest state court as to property, the interpretation of state statutes, their application to things, the construction of state constitutions, and their application to things, the validity of statutes, what are offenses, what are rights, except under commercial law of general application, is exclusively with state courts, and the federal courts will follow their decisions, unless violative of federal law.[6]

"We may think that the Supreme Court has miscon-

[4] Williams v. Kertland, 13 Wall. 306; U. S. v. Fox. 94 U. S. 315; Turner v. Wilkes, 173 U. S. 461; Arndt v. Griggs, 134 U. S. 316 (full).

[5] Percy v. Cockrill (C. C. A.), 53 Fed. 872; Brunswick v. Bank, 99 Fed. 635.

[6] Leeper v. Texas, 139 U. S. 463; Harpending v. Dutch Church, 16 Peters, 455; N. Y. Life Ins. Co. v. Cravens, 20 Sup. Ct. 962; 178 U. S. 389; Fairfiled v. County, 100 U. S. 47; Leffingwell v. Warren, 2 Black, 599; Claiborne Co. v. Brooks, 111 U. S. 400; McElvaine v. Brush, 142 U. S. 156; Morley v. Lake Shore Co. 146 U. S. 162; Bucher v. Cheshire Co. 125 U. S. 555; Dick Duncan v. McCall, 139 U. S. 449; Norton v. Shelby Co. 118 U. S. 425; Williams v. Eggleston, 170 U. S. 303; Loeb v. Trustees, 179 U. S. 472, 21 Sup. Ct. 174; Abraham v. Casey, 179 U. S. 210.

strued its constitution or statute; but we are not at liberty to set aside its judgments. That court is the final arbiter as to such question." [7]

"The elementary rule is that this court accepts the interpretation of a state statute affixed to it by the court of last resort thereof."[8]

And the same is the rule as to the law of the state affecting life or liberty.[9]

This rule that the federal courts follow state decisions as to state laws and rights under them is almost invariable. There are some exceptions. If a "federal question" is involved, if a right vested in the party by federal Constitution, statute or treaty, or protected thereby, is involved, the federal court forms its independent judgment. By this it might be argued is meant, that when an affirmative right, or defense or protection is given, granted by federal law, as the federal court construes and applies that law, as a state court does its law, the federal court will think for itself. We may misunderstand here. I say this is where the federal Constitution or law originates, confers such right or protection, as the right to carry on commerce, the right to exercise a federal office, the right of a colored man to vote. But the Fourteenth Amendment originates, grants nothing; it only protects existing rights coming from the state, held under state law, from impairment without due process of law. Therefore, it

[7] Forsyth v. Hammond, 166 U. S. 518.

[8] Missouri, Kansas & T. R. R. v. McCann, 174 U. S. 586; Merchants' Bank v. Pennsylvania, 167 U. S. 461; Morley v. Lake Shore Co. 146 U. S. 162; Board v. Louisiana, 179 U. S. 622, 21 Sup. Ct. 263.

[9] Nobles v. Georgia, 168 U. S. 398; Leeper v. Texas, 139 U. S. 462.

is with the state court to say whether a party has a right to do a certain thing, or a vested right of property, and the federal court recognizes that decision, if such right is affected only by due process of law.

Contracts.—From principles above stated, as an original question, it might seem that it is for the state court to say, under that clause of the federal Constitution prohibiting states from passing any law impairing the obligation of a contract, first, whether by state law there is a contract to be impaired, since the state has, by the police power, the right to say what shall be a valid contract, and what no contract, and because, second, parties must contract according to the law of the state;[10] and also that clause does not define in what a contract consists, just as the Fourteenth Amendment does not define liberty or property, but leaves it to state law to do this. As the state court held that a judgment was not a contract, it was held that an act reducing interest on a judgment did not violate the clause against the impairment of contract,[11] and followed the state court holding there was no contract. It is with the state court to say what is a contract, and a contract existing according to state law; it is then with the federal judiciary to say, of its own judgment, whether the state act impairs its obligation, as it is with the state court to say whether state laws give a right personal or proprietary, and if they do, then it is with the federal court to say whether it has been worsted by state action without due process. That it is with the

[10] Hooper v. California, 155 U. S. 648.
[11] Morley v. Lake Shore Co. 146 U. S. 162.

state courts to say whether by state law there is a valid contract would seem clear from many cases.[12]

As an original question it might be with an appearance of plausibility claimed that the true rule ought to be that the existence or non-existence of a contract should be tested by state decision, if any; yet cases are easily found antagonizing this. Louisville Co. v. Palmes[13] holds that the federal question before the court is whether the state court gave effect to a state law which impairs the obligation of a contract; "in determining which, and in determining whether there was a contract, the court is not necessarily governed by previous decisions of state courts, except where they have been so firmly established as to constitute a rule of property." This asserts the power of the federal judiciary, not only to say whether state law is such as to impair the obligation of a contract, but also to say that by state law there is a contract contrary to state decision. Is this not making state law of contract; saying what constitutes a contract by state law?

The case of McCullough v. Virginia[14] also holds this doctrine. Other cases assert this.[15] After writing the above I meet with the case of Houston, etc., R. R. Co. v. Texas,[16] which sustains this view. Railroad companies

[12] Wade v. Travis County, 174 U. S. 499; Hartford Ins. Co. v. Chicago, etc. 175 U. S. 91, 108. Same case in C. C. A. 36 U. S. App. 156, 70 Fed. 201; Lehigh Water Co. v. Easton, 121 U. S. 392; Com. Bank v. Buckingham, 5 How. 317, 343; Central Land Co. v. Laidley, 159 U. S. 110.

[13] 109 U. S. 244.

[14] 172 U. S. 102, 19 Sup. Ct. 134.

[15] New Orleans Water Works v. Louisiana Sugar Co. 125 U. S. 18; C. B. & Q. v. Nebraska, 170 U. S. 57. See 66 Am. St. R. 227.

[16] 177 U. S. 77; 20 Sup. Ct. 545; Stearns v. Minnesota, 179 U. S. 223, so holds; so Board v. Louisiana, 179 U. S. 622, 21 Sup. Ct. 263.

owed bonds to Texas. Texas passed acts allowing payment of their interest to be made in certain treasury notes which had been issued by the state. The railroad company made some payments in such treasury notes. Then an act was passed under which such payments were disregarded on the theory that such treasury notes or warrants were issued in violation of the state constitution. The highest state court so held, thus deciding that payment in the notes and the acceptance by the state made no contract of payment. On appeal the United States Supreme Court held just the reverse, held that the state constitution did not invalidate the treasury notes, and did not invalidate the acts authorizing their issue, and that when the railroad paid them, and the state received them, a contract arose, which was impaired by the later act ignoring such payment. In the opinion Mr. Justice Peckham says: "Upon these facts this court has jurisdiction, and it is its duty to determine for itself the existence, construction and validity of the alleged contract, and also whether, as construed by this court, it has been impaired by any subsequent state legislation, to which effect has been given by the court below." For this holding the justice cites cases given in the footnote.[17]

In the McCullough Case the court said, "This court has the right to enquire and judge for itself with regard

[17] Proprietors of Bridge v Hoboken Land Co. 1 Wall. 116; Northwestern University v. People, 99 U. S. 309; Fisk v. Jefferson Police Jury, 116 U. S. 131; N. O. Waterworks Co. v. Louisiana Sugar Co. 125 U. S. 18; Central Land Co. v. Laidley, 159 U. S. 103; Bacon v. Texas, 163 U. S. 207; McCullough v. Virginia, 172 U. S. 102.

to the making of the alleged contract with the holders of the coupons, without regard to the views or decisions of the state court in relation thereto."

It thus appears clear notwithstanding some dissonant decisions above cited, that it is alone with the federal judiciary to say finally whether under state law a contract exists, and if it does exist, whether the state law impairs its obligation. This position seems, perhaps, the better reasoning. It is on the theory that contracts, particularly commercial contracts, are of such vital importance, and are universal, and are governed by general law, and that therefore their import and obligation should be left to the nation, and be protected by it. Here we may fitly apply the eloquent prayer of Cicero: *"Nec enim alia lex Romae, alia Athenis, alia nunc, alia posthac; sed et omnes gentes, et omni tempore una lex et sempiterna et immutabilis continebit."*

It is obviously desirable that negotiable securities, all commercial contracts governed by the mercantile law which pervades the business of the whole country from ocean to ocean, should be tested by rules and decisions applicable, not in some states alone, but the same in all states. It would be dangerous, disastrous to such commercial business to have diverse, variant and conflicting decisions in different states under commercial law, which should be common and the same everywhere. It would not do to have commercial securities held valid in one state and invalid in another. Hence there is much sound reason for the holding of the Supreme Court that it and other federal courts may, in cases involving such commercial matters, act upon their own independent judgment.

Federal Question.—Except in cases between residents of different states, where jurisdiction in the federal courts rests on such diverse citizenship, in order to give federal courts jurisdiction there must be a "federal question" involved in the case.[18] The federal Circuit and Supreme Courts have jurisdiction in cases arising under the Constitution, laws or treaties of the United States. When a state violates any right protected by the Fourteenth Amendment, this jurisdiction attaches, for then there is a federal question. The act of Congress, March 3, 1887, and the amendatory act 13th of August, 1888, provide that "The circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the Constitution of the United States, or treaties made, or which shall be made, under their authority." Therefore, where anyone is deprived of life, liberty or property without due process of law, or is denied the equal protection of the laws, or the privileges or immunities of citizens of the United States are abridged, recourse for remedy can be had to the United States Circuit Court for restraint by injunction or other proper process. If the suit involve debt or property, it must be of the value of $2,000 to give original jurisdiction in the Circuit Court, though the case involved a right under the Constitution of the United States; for the Supreme Court has said: "It is clear that a circuit court can

[18] Byers v. McAuley, 149 U. S. 608; Turner v. Richardson, 180 U. S. 87, 21 Sup. Ct. 295.

not under that statute (Act 1887 as corrected by Act 1888) take original cognizance of a case arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or of a controversy between citizens of different states, or of a controversy between citizens of a state and foreign states, citizens or subjects, unless the sum in dispute, exclusive of interest and costs, exceeds $2,000." Opinion in U. S. v. Sayward,[19] re-affirmed in Fishback v. Western Union[20] and Holt v. Manufacturing Company.[21]

It is not requisite for jurisdiction that the right or thing claimed come from the law of the United States; though it come from state law, it is protected against unlawful state action. There is a federal question, if it be such a right, and is so adversely acted upon by state authority. The original Constitution gives the federal courts jurisdiction in all cases in law and equity, "arising under this Constitution, the laws of the United States and treaties made, or which shall be made, under their authority."[22] And the Fourteenth Amendment having brought within the federal jurisdiction and power the protection against state action, except by due process of law, of life, liberty, property and equality before the law, the judicial power of the nation necessarily extends thereto.

When does a question "arise under" the Fourteenth Amendment to give the federal courts jurisdiction?—"A

[19] 160 U. S. p. 497.

[20] 161 U. S. 96, 99.

[21] 176 U. S. 68, 73 and North American Co. v. Morrison, 178 U. S. 262, 20 Sup. Ct. 869; Illinois C. R. Co. v. Adams (Jan. 1901), 21 Sup. Ct. 251.

[22] Art. 3, Sec. 2.

case in law or equity consists of the right of one party, as well as the other, and may be truly said to arise under the constitution or a law of the United States, whenever its correct decision depends upon a right construction of either." [23]

I refer to the case of Murdock v. Memphis[24] as elaborate upon this subject.

Though there be several questions involved, yet if only one is of federal nature, that is sufficient for original jurisdiction, but not for an appeal by writ of error to the Supreme Court from a decree or judgment of the highest court of the state; for if there be more than one question in the record, and one of them is purely a state question, not a federal question, on which the state decision may stand, that precludes such appeal or writ of error.[25]

Amount or Value in Suit.—If the sum of money or value of the thing in dispute is less than two thousand dollars, the party who claims that his rights are violated contrary to the Fourteenth Amendment is not without redress. He can sue in the state court, and thence appeal to the Supreme Court of the United States without regard to amount or value in controversy; or if sued by another in a state court, he can likewise appeal to the Supreme Court of the United States if the highest court of the state decides against his right. But as just shown (p. 402), he can not, in the first step, go into the Circuit Court.

[23] Mayor v. Cooper, 6 Wall. 252; Martin v. Hunter, 1 Wheat. 314; Cohens v. Virginia, 6 Wheat. 264; Osburn v. Bank, 9 Wheat. 738; Ableman v. Booth, 21 How. 506; New Orleans v. Benjamin, 153 U. S. 411; Claflin v. Houseman, 93 U. S. 130.

[24] 20 Wall. 591.

[25] Hopkins v. McLure, 133 U. S. 380; Bacon v. Texas, 163 U. S. 207; Beatty v. Fenton, 135 U. S. 244.

Exceptions to Rule of Following State Decisions.—I have above stated some matters pertinent under this head. There are exceptions to the rule that federal courts follow state courts in determining whether there is, or is not, a valid binding contract, as above stated (p. 397). A late case[26] thus states the rule: "Questions of public policy as affecting the liability for acts done or upon contracts made and to be performed within one of the states of the Union—when not controlled by the Constitution, laws or treaties of the United States, or by the principles of the commercial and mercantile law, or of general jurisprudence, of national or universal application, are governed by the law of the state, as expressed in its own constitution and statutes, or declared by its highest court," citing many cases. These exceptions admit the rule, and are only made exceptions from necessity. Perhaps, for instance, if a state court were to hold that a contract exempting a common carrier from liability for negligence, or a contract *contra bonos mores,* contrary to general public policy, or liability for fellow servants' acts, were valid, the federal courts would not follow. Holdings of state courts upon general commercial law, everywhere dominant, confined to no state bounds, but which ought to prevail wherever in the nation the wings of commerce go—all decisions contrary to general law— would not be followed in federal courts; but those are exceptions.

"The courts of the United States are not bound by decisions of the state courts upon questions of general commercial law."[27] But these exceptions do not include

[26] Hartford Ins. Co. v. Chicago, etc. Railway, 175 U. S. 91, 100.

[27] Oates v. National Bank, 100 U. S. 239; Washburn & Mfg. Co. v. Reliance M. Ins. Co., 179 U. S. 1, 21 Sup. Ct. 1.

contracts outside the commercial or mercantile law, those contracts relative to the sale and purchase of real and personal property, or charging it with debts, contracts not made under the commercial or mercantile law. Those exceptions do not militate against the well-established principle that the courts of the United States follow the decisions of the highest state courts upon the construction and application of state laws and personal rights under them, and title to real and personal property under such state laws.

Where there has been no state decision upon the matter, of course the federal courts are compelled to form an independent judgment.[28]

This doctrine of exception from following state decisions found early expression in Swift v. Tyson,[29] holding the judiciary act declaring state laws rules of decisions in federal courts had "uniformly been supposed by the Supreme Court to be limited in application to state laws strictly local; that is to say, the positive statutes of the state and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as rights and titles to real estate, and other matters immovable and intra-territorial in their nature and character. The section does not extend to contracts and other instruments of a commercial nature, the true interpretation and effect whereof are to sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence." This statement seems sound.

[28] Burgess v. Seligman, 107 U. S. 20.
[29] 16 Peters, 1.

"When a question to be determined by the Supreme Court is one of general law, it must be settled by reference to all authorities, and not by decisions of the highest state tribunal where the case arose. In such case the decisions of such state court are not binding" on federal courts.[30] That was a case of liability of a master for injury to one servant from the negligence of another servant—a matter of general law.

Overruled State Decisions, Effect of.—The federal courts follow the last decision of the highest state court in its construction and application of state law. The federal Supreme Court has even everruled its own former decisions made according to a state decision in order to follow a later, different state decision. In Green v. Neal[31] the court said: "In a great majority of cases brought before the federal tribunals they are called on to enforce the laws of the states. The rights of parties are determined under those laws, and it would be a strange perversion of principle if the judicial exposition of those laws by state tribunals should be disregarded. These expositions constitute the law and fix the rule of property. Rights are acquired under this rule, and it regulates all transactions which come within its scope."

This rule of following the latest state decision, overruling former state decisions, has been often applied in federal courts, the Supreme Court even reversing lower fed-

[30] B. & O. R. R. Co. v. Baugh, 149 U. S. 368.
[31] 6 Peters, 291. See O'Brien v. Wheelock, 95 F. 883.

eral courts because of state decisions rendered subsequently to such federal courts decision.[32]

Exceptions to Rule of Following Latest State Decisions.—Confessedly there are exceptions to this rule of following the latest of conflicting state decisions, cases in which the Supreme Court has adhered to the former and refused to follow later state cases. These cases are those where county or municipal bonds were issued, negotiable in character, which went into the hands of holders for value, under statutes held by earlier decisions to authorize such bonds, but which, by later state decisions, overruling former ones, were held not to have authorized such bonds. Such bonds have been sustained by the Supreme Court notwithstanding later state decisions which would render the bonds void, and this on the theory that they went into the hands of purchasers on the faith of the prior decision, and thus made contracts which could not be impaired. In one of these cases[33] the opinion says: "As a rule, we treat the construction which the highest court of a state has given a statute of the state as part of the statute, and govern ourselves accordingly; but where different constructions have been given to the same statute at different times, we have never felt ourselves bound to follow the latest decisions, if thereby contract rights which have accrued under earlier rulings will be affected." The opinion

[32] Leffingwell v. Warren, 2 Black 599; Wade v. Travis Co. 174 U. S. 499, 508; U. S. v. Morrison, 4 Pet. 124; Backus v. Fort Street Co. 169 U. S. 557; Bauserman v. Blunt, 147 U. S. 647; Stutsman v. Wallace, 142 U. S. 293; Suydam v. Williamson, 24 How. 427; 48 Am. & Eng. Corp. Cas. 257; State R. R. Tax Cases, 92 U. S. 575; Moores v. Bank, 104 U. S. 625.

[33] Douglass v. Pike County, 101 U. S. 686.

quotes the language of Chief-Justice Taney in Rowan v. Runnels:[34] "Undoubtedly this court will always feel bound to respect decisions of state courts, and from the time they are made regard them as conclusive in all cases upon the construction of their own laws. But we ought not to give them a retroactive effect, and allow them to render invalid contracts entered into with citizens of other states which, in the judgment of this court, were lawfully made." Later this doctrine was held not to be limited to contracts with citizens of other states, but to apply to all contracts.[35] The opinion in Douglass v. Pike County[36] further says: "We recognize fully not only the right of the state court but its duty to change its decisions whenever, in its judgment, the necessity arises. It may do this for new reasons, or because of a change of opinion in respect to the old ones; and ordinarily we will follow them, except so far as they affect rights vested before the change was made. The rules which properly govern courts in respect to past adjudications are well expressed in Boyd v. Alabama, 94 U. S. 645."

In Gelpcke v. Dubuque [37] this doctrine was held. So in several other cases.[38]

This doctrine of departure from state decisions by federal courts as regards contracts, and it seems to be confined to contracts,[39] bears the face of justice; that a contract

[34] 5 How. 134.

[35] Ohio Life Ins. Co. v. Debolt, 16 How. 416.

[36] 101 U. S. 686.

[37] 1 Wall. 175.

[38] Los Angeles v. Los Angeles, 177 U. S. 558; Folsom v. Ninety-six, 159 U. S. 611; Mitchel v. Burlington, 4 Wall. 270; Havmeyer v. Iowa Co. 3 Wall. 294; Rondot v. Rogers, 99 Fed. 202.

[39] Pleasant Township v. Aetna L. Ins. Co. 138 U. S. 67; Loeb v. Trustees, 179 U. S. 472, 21 Sup. Ct. 174.

good when made under the statute law as then expounded by the state court should not be impaired by later adjudications. It is confined to contracts, because the court decided those cases under the clause of the Constitution prohibiting states from passing any law impairing contracts. I say that the doctrine seems just; but can it be sustained on strict legal principles, even in cases of contract? It can not be without a denial of established principles. A judicial decision does not make law. It is supposed only to declare what the law without it is, what the law before it was. The legislature makes law, the court expounds law. Now, the first of two decisions of the same court upon the same facts, when overruled, was not law up to the time of the second decision, and thereafter not law, but, in legal contemplation, after the second decision the first never for one moment was the law. The law of the two decisions can not occupy the same time. The first was a misconstruction, a mistake of law; the second propounds the true law. Blackstone says: "But even in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was *bad* law, but that it was *not law*."[40]

In Gelpcke v. Dubuque[41] the great Justice Miller, than whom few greater jurists have sat on the Supreme Bench, if any, maintained in dissent that though the second Iowa case overruling a former one would destroy the bonds, yet it must be so, as the former decision never was

[40] 1 Bl. Comm. 69.
[41] 1 Wall. 175.

law. He said that the Supreme Court should follow the last decision on state law, and that though the bonds issued while the first decision that the statute authorized their issue was in force, yet that decision never was law. He said: "I understand the doctrine to be in such cases, not that the law is changed, but that it was always the same as expounded by the later decision, and that the former decision was not, never had been, the law, and is overruled for that very reason. The decision of this court contravenes this principle, and holds that the decision of the court makes the law, and in fact that the same statute means one thing in 1853 and another in 1859." He went on to show the conflict with former decisions.

The distinguished law writer Bishop, speaking of Douglass v. Pike County[42] says: "The power both of making and repealing laws is in our legislatures, and the courts have no jurisdiction, even in the minutest degree, in the matter. They can say what a law means; and, if afterwards they see that they have made a mistake, they can correct this error by overruling the former decision. The consequence of which overruling is, that the blunder is thenceforward deemed never to have been law. This doctrine is fundamental in our jurisprudence, rendered irrepealable, it is believed, by various provisions of our written constitutions, both national and state. Still, unhappily, in seeming violation of this doctrine, the courts have held that where a statute has received what they term a settled exposition, then a contract has been made which under it is good, there is created an obligation which can not be

[42] 101 U. S. 677.

overturned by decisions overruling the earlier exposition."[43] Exactly similar doctrine is asserted in other cases.[44]

I refer particularly in support of this view to the able discussion in Alferitz v. Borgwardt,[45] and I beg to refer also to an opinion filed by me in the case of Weston v. Ralston.[46]

The Constitution says no state shall make any "law" impairing contracts. "Law" is the same in both cases. In Swift v. Tyson[47] Justice Story said: "In the ordinary use of language it will hardly be contended that the decisions of courts constitute laws. They are, at most, only evidence of what the laws are; and are not of themselves law. They are often re-examined, reversed and qualified by the courts themselves whenever they are found to be either defective, ill-founded or otherwise incorrect." This statement is quoted and approved in later cases.[48]

Having written to this point I meet the case of Alferitz v. Borgwardt.[49] The Supreme Court of California had held that under a certain kind of mortgage title vested, but later held that it did not, and in the case cited the court said: "But appellant contends that it (the first decision) states the law upon the subject, and that law

[43] Bishop, Contracts, Sec. 569.

[44] Allen v. Allen, 16 L. R. A. 646; Ray v. Western Pa. Gas Co. 138 Pa. St. 576, 12 L. R. A. 290; Wood v. Brady, 150 U. S. 18; Frink v. Darst, 14 Ill. 311; Wade v. Travis Co. 174 U. S. 499.

[45] 126 Cal. 201.

[46] 36 S. E. p. 449, 47 W. Va.

[47] 16 Peters, p. 18.

[48] R. R. Co. v. Bank, 102 U. S. 29, 54; N. O. Water Co. v. La. Sugar Co. 125 U. S. 607; Pollock v. Farmers' L. & T. Co., 158 U. S. 601.

[49] 126 Cal. 201.

was not changed until the decision of Shoobert v. DeMotta, 112 Cal. 215; 53 Am. St. R. 53, in 1896, and in the meantime this mortgage was made. It is said that to apply the rule declared in the last case, rather than that laid down in the first, would be to impair the obligation of contracts. (Douglass v. County of Pike, 101 U. S. 687.) In the case named it is said: 'After a statute has been settled by judicial construction the construction becomes, so far as *contract* rights under it are concerned, as much a part of the statute as the text itself, and a change of the decision is to all intents and purposes the same in effect on contracts as the amendment of the law by means of a legislative enactment.' No rights are acquired here under a statute in the meaning of that line of authorities, which seem to refer to laws authorizing the government or some sub-division thereof to contract certain obligations. Beyond this the cases cited do not go. I hardly think the rule would be applied to decisions of state courts in regard to general rules of law, although they may affect contract rights. At best, they but lay down a rule for the federal courts as to how far they will be governed by decisions of state courts in the construction of state statutes. Laws are not made by judicial decisions. The court simply determines the rights of the parties in that particular controversy.

Courts have never thought themselves bound by it as they are by a valid statute. No doubt an appellate court assumes a very grave responsibility when it reverses a former decision whcih has become a rule property or the law of contracts, and whenever this is done it must be understood that the court has not only considered the ob-

jections to the former decision, but the evil which may follow from its reversal. The matter is ably discussed in Hart v. Burnett, 15 Cal. 530, and the views there expressed have been frequently affirmed. The mere fact that an error has been made in a decision of the Supreme Court is no reason for perpetuating it, but in a given case, to correct it may be productive of more evil than to permit it to stand. And, as stated in the above case, justice is not always on the side of him who claims under the erroneous decision. Why should one who has honestly acquired property according to the law of the land lose it because a judge relying upon imperfect presentation, has erred? Why should the policy of the government, adopted upon great deliberation, be so defeated? And especially so when a decision was never deemed to have the force of absolute law? If the Supreme Court of the United States shall finally go with the appellants in holding that the courts are prohibited from reversing an erroneous construction of a state statute because such decision is a law which impairs the obligation of contracts, then the courts can never change the erroneous construction; for a court can only pass upon existing rights, and must always look to the past for its law, and, so far as it declares the law, it declares what it was and is, but can not enact what it shall be. I do not think that august tribunal will adopt this view which, if adopted, can result only in the perpetuation of error."

In Hart v. Burnett,[50] beginning at page 597, is an able discussion of the doctrine of *stare decisis,* and it is shown

[50] 15 Cal. 530.

that where a renunciation of erroneous decisions, though several in number, and though they concern title to real estate, will promote public interest, they often have been, ought to be, renounced.

In all these cases in the Supreme Court it is required, in order to apply the doctrine, that there be a contract valid under the state law, as expounded by the state court at its date, to uphold the contract over the subsequent decision. I do not understand that a criminal act which would not be a crime under decisions rendered at its commission, could not be prosecuted as a crime under a later decision holding it to be a crime. Would the later decision be an *ex post facto* "law"? It can not be meant that a civil tort not such when done under decisions then existing would not be an actionable tort under later decisions holding it to be such. It may, too, be remarked that under that clause of the Constitution denying states power to "make any law impairing the obligation of a contract," it is settled that to come under that clause there must be a constitution or statute, and that a judicial decision is not a "law" within its meaning.[51] It was not intended to take away from the judiciary power to say that a contract is not valid, and never was; but the doctrine of Gelpcke v. Dubuque and other like cases makes a decision of a court a law. I can not see when the question is, What is a "law"? why the same principle does not apply, whether it is a law to impair a contract or an overruled decision. In the former case it is settled that a decision is not a "law."

[51] Central Land Co. v. Laidley, 159 U. S. p. 109; N. O. Water Co. v. Sugar Co. 125 U. S. 18; Brown v. Smart, 145 U. S. p. 458.

To support the point that a court may, by overruling antecedent decisions, affect rights under it, see Wood v. Brady,[52] holding that a party has no vested right in a former decision construing a statute of limitations.[53] But contract rights seem to stand good against impairment by later decisions.[54]

State Decisions.—It must be said that the question when the courts will follow or depart from state decisions upon state law is in considerable confusion under Supreme Court decisions. They are not harmonious, and it is difficult to take any accurate, secure ground on the subject. Still, the general rule may be stated to be that upon state law, where no questions of rights conferred by the federal Constitution, laws or treaties are involved, the federal courts will follow state decisions.

I should have stated before that another exception to the rule that federal courts follow state decisions, is that stated in Burgess v. Seligman.[55] "The courts of the United States, in the administration of state laws in cases between citizens of different states, have an independent jurisdiction coordinate with state courts, and are bound to exercise their own judgment as to the meaning and effect of those laws." The reason given is that the original grant of jurisdiction to federal courts where the parties live in different states would do the non-resident no good if the federal court had only to follow the state court.

[52] 150 U. S. 18.

[53] Wood v. Brady, 150 U. S. 18.

[54] Los Angeles v. Los Angeles, 177 U. S. 558; Folsom v. Ninety-six, 159 U. S. 611; Rondot v. Rogers, 99 Fed. 202 (C. C. A.); Pleasant Township v. Etna L. Ins. Co. 138 U. S. 67.

[55] 107 U. S. 20.

Fellow Servants—State Decisions.—The question of whether employees are fellow servants, so as to preclude recovery of the master for injury to one employee from the negligence of another, is one of general law, and federal courts will not follow state courts as to that subject against their own judgment. Hunt v. Hurd (C. C. A.) 98 Fed. 683.

State Criminal Decisions.—As the state courts have sole jurisdiction to administer state criminal laws, so their decision as to their validity and their construction by the highest state courts are followed by federal courts whenever they are called upon to pass upon them, almost infallibly, more uniformly than in civil cases. The Judiciary Act of 1789 saying that in trials at law in federal courts the laws of the state shall be rules of decision, does not apply to criminal cases.[56] But the federal courts have no concurrent jurisdiction with state courts in criminal law as they have in civil cases, but state courts have exclusive jurisdiction in enforcing criminal law of the state, and therefore state decisions upon its criminal law are conclusive on the federal courts.[57]

"When a prisoner is indicted in a state court for murder, it is for the courts of the state to decide whether the indictment sufficiently charges that crime in the first degree. In view of the decisions of the highest court of New Jersey declaring the meaning and scope of the statutes of that state under which the accused was prosecuted, it can not be said that he was prosecuted under an indict-

[56] U. S. v. Reid, 12 How. 361; Bucher v. Cheshire Co. 125 U. S. 555; Logan v. U. S. 144, 263, 300.

[57] New York v. Eno, 155 U. S. 89.

ment based on statutes denying him the equal protection of the law, or that were inconsistent with due process of law as prescribed by the Fourteenth Amendment."[58]

A form of indictment prescribed by a state act does not violate the Fourteenth Amendment. It is for the state court to decide upon its sufficiency.[59] Decisions of the highest court of a state as to amendment of the record in a murder case are final and due process of law.[60]

State Rules of Evidence are Rules of Evidence in Federal Courts under §34, C. 20, Act 1789, in civil cases, except where the Constitution, laws or treaties of the United States otherwise require or provide.[61] The decisions cited were under the old act of 1789. A later act[62] provides that no one shall be excluded as a witness in federal courts on account of color, or in any civil case because he is a party or interested, except that in actions by or against executors, administrators or guardians neither party shall be allowed to testify as to any transaction with or statement by the testator, intestate or ward, unless called by the opposite party or required by the court, and then says, "In all other respects the laws of the state in which the court is held shall be the rule of decision as to the competency of witnesses in the courts of the United States in trials at common law and in equity and admiralty." Thus, with the exception of the instances mentioned, state laws are the rules of decision in federal courts so far as the com-

[58] Bergman v. Backer, 157 U. S. 655.
[59] Caldwell v. Texas, 137 U. S. 692.
[60] Fielden v. Illinois, 143 U. S. 452.
[61] Ryan v. Brindley, 1 Wall. 66; Potter v. Bank, 102 U. S. p. 165.
[62] Revised Stat. Sec. 858; 2 Desty, Sec. 375; Logan v. U. S. 144 U. S. 263.

petency of witnesses is concerned. The Civil Rights Act[63] says that every person within the jurisdiction of the United States shall have the right to "give evidence," the same as white persons. It is not supposed that this forbids the states from discriminating as to competency of witnesses, so they do not exclude merely on account of color, and so the legislation be applicable to all alike of a class.

[63] Revised Stat. Sec. 1977.

Chapter 19.

FEDERAL PROCESSES TO ENFORCE AMENDMENT.

How does the federal judiciary vindicate the rights protected by the Fourteenth Amendment against wrongful adverse action by state authority?

We may here premise a basic principle laid down by the Supreme Court in L'Hote v. N. Orleans, 177 U. S. 587: "Until there is some invasion of congressional power or private right secured by the Constitution of the United States, the action of a state in such respect is beyond question in federal courts." This important principle must be always regarded.

Appeal to Supreme Court of the United States.—If it is claimed that a right protected by the Fourteenth Amendment has been denied by an inferior court of the state, the party must appeal to the highest state court, and if that court decides adversely to his right he can appeal to the Supreme Court of the United States, provided the case turns on the constitutional question; for if the case might have turned on another question, one not involving a right claimed as protected by the amendment, not a federal question, he can get no relief, because a mere

erroneous decision by a state court upon a purely state question, one not involving rights under federal Constitution or law, does not give right to appeal to the United States Supreme Court. The state court must decide erroneously on that constitutional right to reverse it, and adversely to that right.[1] "The conduct of a criminal trial in a state court can not be reviewed by this court, unless the trial is had under some statute repugnant to the Constitution of the United States, or was so conducted as to deprive the accused of some right secured to him by that instrument. Mere error in administering the criminal law of the state, or in the conduct of a criminal trial—no federal right being invaded or denied—is beyond the revisory power of this court under the statutes regulating its jurisdiction. Indeed, it would not be competent for Congress to confer such power upon this or any other court of the United States."[2]

So as to civil cases. There must be a federal question for an appeal to the United States Supreme Court. The statute says: "A final judgment or decree in any suit in the highest court of a state, in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or any authority exercised under, the United States, and the decision is against the validity, or where is drawn in question the validity of a statute of, or an authority exercised under, any state on the ground of their being repugnant to the Constitution, treaties, or laws

[1] Eustis v. Bolles, 150 U. S. 361; Missouri, etc. Co. v. Fitzgerald, 160 U. S. 556; N. Orleans v. N. O. Waterworks, 142 U. S. 79; Bacon v. Texas, 163 U. S. 207; Lowry v. Silver City Co. 179 U. S. 196, 21 Sup. Ct. 104.

[2] Gibson v. Mississippi, 162 U. S. 565; Davis v. Texas, 139 U. S. 651; Illinois C. R. Co. v. Adams (Jan. 1901), 21 Sup. Ct. 251; Yazoo & M. V. R. Co. v. Adams, 21 Sup. Ct. 256. 180 U. S. 1.

of the United States, and the decision is in favor of their validity, or where any title, right, privilege or immunity is claimed under the constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege or immunity, specially set apart or claimed by either party, under such constitution, treaty, statute, commission or authority, may be re-examined, reversed or affirmed in the Supreme Court upon a writ of error."[3]

This requires no amount or value for jurisdiction by appeal if federal question exists.

To get an appeal to the Supreme Court the case must fall under that statute. "To give this court jurisdiction of a writ of error to a state court, it must affirmatively appear not only that a federal question was presented for decision by the state court, but that its decision was necessary to the determination of the cause, and that it was decided adversely to the party claiming a right under the federal laws or constitution, or that the judgment as rendered could not have been rendered without deciding it."[4]

"It must appear that some title, right, privilege or immunity under the constitution or laws of the United States was specially set up or claimed there (in the state court), and that the decision of the highest court of the state in which a decision could be had, was against the right, title, privilege or immunity so set up or claimed."[5]

[3] Rev. Stat. Sec. 709.

[4] Eustis v. Bolles, 150 U. S. 361; Bacon v. Texas, 163 U. S. 207.

[5] Sayward v. Denny, 158 U. S. 180; Scuyler Bank v. Bollong, 150 U. S. 85; Banholzer v. N. Y. Ins. Co. 178 U. S. 402; Davis v. Burke, 179 U. S. 399; 21 Sup. Ct. 210, 229; Amer. Sugar Co. v. Louisiana, 179 U. S. 89, 21 Sup. Ct. 43; Loeb v. Trustees, 179 U. S. 472, 21 Sup. Ct. 174; Kizer v. Texarkana Co. 179 U. S. 199, 21 Sup. Ct. 100.

But this federal question must exist in the record,—a mere assertion of its existence not being sufficient, but the record must disclose the presence of such question.

"When a suit does not really and substantially involve a dispute or controversy as to the effect or construction of the Constitution of the United States, upon the determination of which the result depends, there is not a suit arising under the Constitution of the United States." [6]

When it appears that some title, right, privilege or immunity on which recovery or defense depends, will be defeated by one construction of the constitution or laws of the United States, or sustained by the opposite construction, the case is one arising under the constitution or laws of the United States; otherwise not.[7]

The suit must "arise out of a controversy in regard to the operation and effect of some provision of the Constitution of the United States upon the law and facts involved.[8]

By the Constitution, act of Congress and decisions, when a right under the Fourteenth Amendment is denied by the decision of a state court of last resort, an appeal lies to the Supreme Court of the United States. If the federal question really arises, is involved in the case—if the decision must be for or against the right claimed under the amendment in order to decide the case, and if that is the sole pivotal question, and the state decision may not rest

[6] N. Orleans v. Benjamin, 153 U. S. 411; Lambert v. Barrett, 159 U. S. 660; Western Union Tel. Co. v. Ann Arbor R. Co. 178 U. S. 239, 20 Sup. Ct. 867; Avery v. Popper, 179 U. S. 305, 21 Sup. Ct. 94; Yazoo & M. V. R. Co. v. Adams, 180 U. S. 1, 21 Sup. Ct. 256.

[7] Starin v. New York, 115 U. S. 257.

[8] Goldwashing Co. v. Keyes, 96 U. S. 199. See Martin v. Hunter, 1 Wheat. 304, for full discussion of federal jurisdiction. See Amer. Sugar Co. v. Louisiana, 179 U. S. 89, 21 Sup. Ct. 43.

upon another question that is of purely state cognizance, such appeal to the Supreme Court of the United States, by writ of error, lies, only by writ of error.

Pretence Jurisdiction.—A party can not go in any way into and federal court simply fraudulently to evade state jurisdiction, when his claim of "federal question," that is, a right under the constitution or laws of the United States, is not real, but merely colorable.[9] "The administration of justice should not be interfered with on mere pretexts," and a suit in a federal court of original jurisdiction or appeal on frivolous federal questions will be dismissed.[10]

United States Circuit Courts.—As elsewhere stated, if a party be deprived of life, liberty or property by state authority without due process, or denied the equal protection of the law, or his privileges and immunities be abridged, he may go to the federal circuit court for relief. But can that court reverse or nullify for that cause a decision already made in the matter by any state court? It can not by appeal, as no appeal lies to such circuit court from a state court. It can not act by injunction to the state court judgment, as the act of Congress prohibits an injunction from a federal to a state court, except in a proceeding in bankruptcy.[11] The circuit court can not reverse in any way. "A circuit court of the United States can not revise or set aside the final decree rendered by a state court which

[9] Pittsburg & L. A. Co. v. Cleveland Iron Co. 178 U. S. 270; Banholzer v. N. Y. L. Ins. Co. 178 U. S. 402; Shreveport v. Cole, 129 U. S. 36; New Orleans v. Benjamin, 153 U. S. 411.

[10] Lambert v. Barrett, 159 U. S. 660.

[11] Rev. Stat. Sec. 720; Haines v. Carpenter, 91 U. S. 254.

had complete jurisdiction of the parties and subject-matter."[12]

Removal of Cause from State to Federal Court.—Another means of enforcing the Fourteenth Amendment is by removal of a suit or proceeding from a state court to a federal court. "Any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made by or under their authority, of which the Circuit Courts of the United States are given original jurisdiction by the preceding section, which may be now pending, or which may be hereafter brought, in any state court, may be removed by the defendant or defendants therein to the Circuit Court of the United States for the proper district."[13] The amount or value in dispute must be two thousand dollars, excluding interest and costs, as that is necessary for original suit in the Circuit Court. Any civil suit of any nature, which might have been first brought in the United States Circuit Court, may be removed. Any case arising out of a controversy in regard to the operation and effect of some provision of the federal Constitution or law upon the facts involved may be so removed.[14] But there must be a federal question if there is no diverse citizenship. I do not speak of that as a ground of removal, but only of a question under the federal Constitution.

[12] Nongue v. Clapp, 101 U. S. 551; Elder v. Richmond, 19 U. S. App. 118, 58 Fed. 536; Forsyth v. Hammond, 166 U. S. 506; Riggs v. Johnson, 6 Wall. 195.

[13] Act March 3, 1887, 24 U. S. Stat. 552, amended by act Aug. 13, 1888, 25 U. S. Stat. 433.

[14] Goldwashing Co. v. Keyes, 96 U. S. 199; Mexican Co. v. Davidson, 157 U. S. 201; Galveston, etc. v. Texas, 170 U. S. 226. As to amount *Re* Penn. Co. 137 U. S. 451.

"A case (not depending on the citizenship of the parties, nor otherwise specially provided for) can not be removed from a state court into the Circuit Court of the United States, as one arising under the Constitution, laws or treaties of the United States, unless that appears by the plaintiff's statement of his own claim."[15] But if the answer sets up a defense or right under the Constitution, the case would be removable.

There is a federal question calling for removal whenever the case involves the question of a right under the Fourteenth Amendment, and calls for the construction and application of that amendment.[16] Whenever a constitutional or federal question exists, no matter about citizenship.[17] When a state court continues to hold jurisdiction after petition is filed for removal, its wrongful action in the case further is to be corrected by a writ of error or appeal, not by punishment of the state judge for contempt. But after application for removal in a proper case, when the state court refuses removal, the federal court at once gets jurisdiction and can proceed with it as if the state court had made a removal,[18] and thereafter state court's action is void.

A late case holds that a refusal to allow a foreign corporation, which, under state statute allowing it to do so, has become a domestic corporation, to remove a cause from

[15] Oregon, etc. v. Skottow, 162 U. S. 490, 495.

[16] Cohens v. Virginia, 6 Wheat. 379; Kansas Pac. Co. v. Atchison, etc. Co. 112 U. S. 416; Amer. Sugar Co. v. Louisiana, 179 U. S. 89.

[17] Cohens v. Virginia, 6 Wheat. 379; Kansas Pac. Co. v. Atchison, etc. Co. 112 U. S. 416.

[18] C. & O. R. R. Co. v. White, 111 U. S. 134; Kern v. Huidekoper, 103 U. S. 485.

a state court to a federal court, does not abridge the privileges and immunities of a citizen of the United States, or deprive it of property without due process of law, or of equal protection under the Fourteenth Amendment. It held that a foreign corporation so becoming domestic, had no right of removel when sued in a state court of North Carolina by a citizen thereof.[19] If the federal court quashes the indictment removed it can not go further, but sends the accused to state court for new prosecution.[20]

Court First in Possession of Case.—Suppose a state court has lawful first possession of a case, and the party takes a notion that he prefers the federal forum. Though it is a case which might have been originally brought in a federal court, yet having begun in a state court, that court has a right to finish it, because of the rule that between courts of concurrent jurisdiction the court which first obtains possession of a case retains it to the end.[21] So the party must remove his case, or let it go on to final judgment in the state court, and to the highest state court by appeal, and then go to the United States Supreme Court by appeal. He can not, while his suit is pending in the state court, sue in the United States Circuit Court.

Erroneous State Judgment, though it do involve a right under the federal Constitution, stands good until reversed

[19] Debmam v. Southern Bell Tel. Co. 36 S. E. 269, valuable opinion.

[20] Bush v. Kentucky, 107 U. S. 110.

[21] Ward v. Todd, 103 U. S. 327; Central Nat. Bank v. Stevens, 169 U. S. 432, 459; Harkrader v. Wadley, 172 U. S. 148; Parsons v. Snider, 42 W. Va. 517; Oliver v. Parlin & Orendorf Co. 105 Fed. 272.

as *res judicata* in federal courts, and can not be collaterally assailed, unless void for want of jurisdiction.[22]

Criminal Cases.—Suppose a state court is depriving a man of life or liberty contrary to the Fourteenth Amendment. How does the federal authority intervene? Here we must remember that the full police power is left with the states intact from the Fourteenth Amendment, and this police power included the power to make and enforce criminal laws.[23] Thus the states have full and absolute power to enact and execute by their courts laws for the breaking of their peace. For the exercise of the functions committed by the states to the Union it can enact, under its police power, all needful criminal and penal laws, and has done so in a considerable code denouncing punishment upon offenses against coinage, paper money, mail, pensions, internal revenue, etc. Federal courts execute these laws exclusively, state courts having no authority over them; nor have the criminal laws or state rules of evidence any application in such case.[24] The act of Congress in words says that the "jurisdiction vested in the courts of the United States in the cases hereinafter mentioned shall be exclusive of the courts of the several states . . . of all crimes and offenses against the United States." Nor have federal courts any jurisdiction to punish crime against a state.[25]

[22] Forsyth v. Hammond, 166 U. S. 506.

[23] Barbier v. Connolly, 113 U. S. 27.

[24] Bucher v. Cheshire Co. 125 U. S. 555; U. S. v. Reid, 12 How. 361; Logan v. U. S. 144 U. S. 263.

[25] Pettibone v. U. S. 148 U. S. 209.

"By the Fourteenth Amendment the powers of the states in dealing with crimes within their borders are not limited, except that no state can deprive particular persons, or classes of persons, of equal and impartial justice under the law; that the law in its regular course of administration through courts of justice is due process, and when secured by the law of the state, the constitutional requirement is satisfied; and the due process is so secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice." [6]

"When a state court has entered upon the trial of a criminal case, under a statute not repugnant to the Constitution of the United States, and has jurisdiction of the offense and of the accused, mere error in the conduct of the trial can not be made the basis of jurisdiction in a court of the United States to review the proceedings upon a writ of habeas corpus." "The repugnancy of the state statute to the state constitution will not authorize a writ of habeas corpus from a court of the United States, unless the prisoner is in custody under that statute, and unless also the statute is repugnant to the Constitution of the United States." [27]

"The question whether the evidence in the case was sufficient to justify the verdict, and the question whether the constitution of Kansas was complied with or not,

[26] Leeper v. Texas, 139 U. S. 462; Arrowsmith v. Harmoning, 118 U. S. 194.

[27] Andrews v. Swartz, 156 U. S. 272; Harkrader v. Wadley, 172 U. S. 148.

in certain proceedings on the trial, were not federal questions which this court could review." [28]

"When a trial court of a state has jurisdiction and power, under state law, to determine the law applicable to the case of an indictment and trial for murder, and the prisoner, when convicted, has an appeal to an appellate court of the state, of which he avails himself, the Circuit Court of the United States, if applied to for a writ of habeas corpus upon the ground that the proceedings are in violation of provisions of the Coustitution of the United States, may properly decline to interfere." [29]

The Supreme Court of the United States can not review the judgment of the highest state court in a murder case "in the absence of a federal question giving this court jurisdiction. The question sought to be presented as federal questions are entirely within the exercise of the powers of the state, and this court has no jurisdiction of them." [30] Touching the finality of state decisions in criminal cases I refer back to what is said on page (417) as pertinent here.

But suppose a state tribunal is entertaining a prosecution, and the prisoner is being deprived of life or liberty without due process of law. Does he have to go through the trial and appeal to the state's highest court, and thence to the United States Supreme Court? Is there no process by which he can set himself free by at once bringing his case before the federal court, and there testing the question whether he is being deprived of life or liberty without due process?

[28] Baldwin v. Kansas, 129 U. S. 52.

[29] *In re* Duncan, 139 U. S. 449.

[30] Davis v. Texas, 139 U. S. 651; Davis v. Burke, 179 U. S. 399, 21 Sup. Ct. 210; Amer. Sugar Co. v. Louisiana, 179 U. S. 89, 21 Sup. Ct. 43.

No Injunction against State Prosecution.—The Circuit Court of Virginia awarded an injunction against a state court restraining it from prosecuting a man for embezzlement under state law; but the United States Supreme Court held that "A Circuit Court of the United States, sitting in equity in the administration of civil remedies, has no jurisdiction to stay by injunction proceedings pending in a state court in the name of the state to enforce the criminal laws of such state." [31]

A federal statute forbids an injunction from a federal to a state court, except in bankruptcy cases, and except to protect its own jurisdiction in a case already in it before commencement of a suit about the same matter in a state court.[32]

[31] Harkrader v. Wadley, 172 U. S. 148.

[32] U. S. v. Parkhurst-Davis Co. 176 U. S. 317; Iron Mountain R. Co. v. City of Memphis, 96 F. 113.

Chapter 20.

HABEAS CORPUS.

This great writ of liberty, the Habeas Corpus, belonging to all common law courts under their original jurisdiction, once had narrow office in the federal judiciary. Under the Act of 1789 it could not reach prisoners held under state authority. In 1832, when nullification of federal revenue laws was threatened or existed in South Carolina, and federal officers were prosecuted there in state courts for acting under those laws, Congress extended the writ of habeas corpus for the rescue of persons confined under state authority for acts done as federal officers. In 1842 the writ was extended to those in custody for acts done under color of authority of a foreign country, in order to thus vindicate the rights of a foreign country under the law of nations. In 1867 the writ of habeas corpus in federal courts was extended to all persons restrained of liberty in violation of the Constitution, laws or treaties of the United States. After this act Chief-Justice Chase said in *Ex parte* McArdle:[1] "This legislation is of the most comprehensive character. It brings within the habeas corpus jurisdic-

[1] 6 Wall. 318.

tion of every court and every judge every possible case of privation of liberty contrary to national Constitution, law or treaty. It is impossible to widen its jurisdiction. It is to this jurisdiction that the system of appeals is applied."

A person undergoing prosecution in a state court for a state crime, who claims that he is being deprived of right contrary to the Fourteenth Amendment, may, under circumstances in exceptional cases, be rescued from state grasp and custody by a writ of habeas corpus from a federal court. It will be at once realized that this is a very grave and delicate power to be exercised by the national judiciary, ought to be so regarded by it, and is rarely resorted to. The expressions of the Supreme Court are full of caution to the subordinate courts upon the subject. It is a direct attack upon the authority of a state, indeed upon its dignity and honor, as it assumes that the state tribunals will not accord to the prisoner his just defense under the Constitution of his country, and, as just stated, the Supreme Court has warned inferior federal courts, with emphasis, to be slow and chary in the exercise of their jurisdiction by habeas corpus in such cases. Still, the power has, in definite terms, been frequently declared to exist. The act of Congress is broad:[2] "The Supreme Court and the circuit and district courts shall have power to issue writs of habeas corpus." Another section[3] restricts the writ to certain cases, among them cases where the person is in custody

[2] Rev. Stat. Sec. 751.
[3] Sec. 753, Rev. Stat.

"in violation of the Constitution, or of a law or treaty of the United States."

"When a state court has jurisdiction of the offense and the accused under an indictment found under a statute of a state, not void under the Constitution of the United States, and proceeds to judgment under that statute, a circuit court of the United States has no authority to interfere with the execution of the sentence by writ of habeas corpus. The refusal by a state court to grant a writ of error to a person convicted of murder, or to stay the execution of the sentence, will not warrant a court of the United States in interfering in his behalf by writ of habeas corpus."[4]

A writ of habeas corpus is a civil proceeding, but not a writ of error to correct error in a criminal prosecution; that must be done by an appellate process. But where the judgment is utterly void, if in a state court, or though not void if in a federal court, but the statute under which the prosecution is going on is contrary to the federal Constitution, or the party is denied essential equality before the law, it lies, but not to correct mere error, however gross.[5]

"When a prisoner convicted of crime in a state court, and sentenced there to a punishment, complains that his rights under the Constitution or laws of the United States have been thereby violated, he may seek relief in the federal courts by application to either the proper circuit court for a writ of habeas corpus, or to a justice of this court for a writ of error to the state court. The remedy

[4] Bergman v. Backer, 157 U. S. 655; Gusman v. Marrero, 180 U. S. 81, 21 Sup. Ct. 293.

[5] *In re* Swan, 150 U. S. 648; *In re* Duncan, 139 U. S. 449; Eaton v. West Virginia, 91 Fed. 760.

by habeas corpus should be limited to cases in which the judgment or sentence attacked is clearly void by reason of its having been rendered without jurisdiction, or by reason of the court's having exceeded its jurisdiction in the premises; and the general rule and better practice, in the absence of special facts and circumstances, is to require the prisoner to seek a review by writ of error, instead of resorting to a writ of habeas corpus."[6] The writ of error here meant is one from a state court to the United States Supreme Court. So the party must first go to the highest state court.

In New York v. Eno[7] the holding is that whether an offense charged in an indictment is one against the state or against the nation, and exclusively punishable in the national courts, or against both, is a question for a state court of original jurisdiction (its duty to render such decision as will give effect to the supreme law being the same as that resting on the courts of the Union), and the federal courts should decline to issue a habeas corpus, unless the case is one of real urgency. "The proper time, in such case, to apply for such writ to this court is after the claim to immunity from prosecution in the state court has been passed on adversely to him by the highest court of the state."

In the leading case upon the subject *Ex parte* Royall,[8] it was held: "Circuit courts of the United States have jurisdiction on habeas corpus to discharge from custody a person restrained of his liberty in violation of the Con-

[6] *In re* Frederich, 149 U. S. 70.
[7] 155 U. S. 89.
[8] 117 U. S. 241.

stitution of the United States, but who at the time is held under state process for trial on an indictment charging him with an offense against the laws of the state. When a person is in custody under process from a state court of original jurisdiction for an alleged offense against the laws of such state, and it is claimed that he is restrained of his liberty in violation of the Constitution of the United States, the Circuit Court of the United States has a *discretion* whether it will discharge him in advance of his trial in the court in which he is indicted; but this discretion should be subordinated to any special circumstances requiring immediate action. After conviction in the state court the circuit court has still a discretion whether he shall be put to his writ of error to the highest court of the state, or whether it will proceed by writ of habeas corpus summarily to determine whether he is restrained of his liberty in violation of the Constitution of the United States."

In a later case, Whitten v. Tomlinson,[9] the decision is: "Under Section 753 of Revised Statutes the courts of the United States have power to grant writs of habeas corpus, for the purpose of inquiring into the cause of restraint of liberty of any person in jail, in custody under authority of a state, in violation of the Constitution of the United States, or a law or treaty of the United States; but, except in cases of peculiar urgency, will not discharge the prisoner in advance of a final determination of his case in the courts of the state; and even after determination in those courts, will generally leave the petitioner to his rem-

[9] 160 U. S. 231.

edy by writ of error from this court." The court strongly emphasized the wisdom of not discharging in advance of the action of the state court, saying: "To adopt a different rule would unduly interfere with the exercise of the criminal jurisdiction of the several states, and with the performance by this court of its appropriate duties."

In *Ex parte* Royall[10] the court, speaking by Mr. Justice Gray, of the act of Congress providing that federal courts and judges in cases of persons in custody "in violation of the Constitution, or laws or treaty of the United States shall forthwith award a writ of habeas corpus, unless it appear from the petition that a party is not entitled thereto," and providing for summary hearing, said: "We can not suppose that Congress intended to compel those courts, by such means, to draw into them, in the first instance, the control of all criminal prosecutions commenced in state courts exercising authority within the same territorial limits, where the accused claims that he is held in custody in violation of the Constitution of the United States. The injunction to hear the case summarily, and 'thereupon dispose of the party as law and justice may require,' does not deprive the court of discretion as to the time and mode in which it will exert the powers conferred upon it. That discretion should be exercised in the light of the relations existing, under our system of government, between the judicial tribunals of the Union and the states, and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between courts equally

[10] 117 U. S. 241.

bound to guard and protect rights secured by the Constitution."

A petition for habeas corpus showed a conviction of felony in a state court, for embezzlement of funds of a national bank, alleged to be in violation of the federal Constitution, but for the reason that it showed no reason why the parties could not have a review in the state supreme court, or why it should not be allowed to review without interference by the federal court, the habeas corpus was refused.[11]

A party sought a habeas corpus because he was convicted of murder, when no person of his race, African, was on the grand or petit jury, though the state law did not exclude persons of color therefrom. It was held that he must make the point in the state court, and then go to the state's highest court, and, failing to do so, could have no federal writ of habeas corpus. "It was not intended by Congress that circuit courts of the United States should, by writs of habeas corpus, obstruct the ordinary administration of the criminal law of the state through its own tribunals." [12]

A party was, by violence, seized in one state and carried to another, where a prosecution was pending against him. He sought a federal habeas corpus. The court held that what effect such seizure would have was as much within the province of the state court as a question of common law or law of nations, as within the province of federal courts, and the writ was refused, and the case of *Ex parte* Royall reaffirmed.[13]

[11] *Ex parte* Fonda, 117 U. S. 516.
[12] *In re* Wood, 140 U. S. 278; Pepke v. Cronon, 155 U. S. 100.
[13] Cook v. Hart, 146 U. S. 183. So *Ex parte* Glenn, 103 Fed. 947.

The mere general statement in a petition for habeas corpus that a petitioner is detained in violation of the Constitution and laws of the United States is an averment of mere conclusion of law, not matter of fact. It must be shown wherein his detention is without due process.[14]

Federal Question.—But to get a federal writ of habeas corpus the case must present a federal question. For instance, it was denied where it was sought by the father of a child to obtain possession of it from its grandparents. No question of restraint of liberty contrary to the federal Constitution was involved. A federal writ of habeas corpus, like all other federal process, must have a federal question for its basis.[15]

No State Habeas Corpus for Federal Prisoners.—Though once claimed by state courts, it is now settled that a state court has no power to issue a writ of habeas corpus to discharge a prisoner in federal custody.[16] So he be in custody under authority, or color of authority, civil or military, of the United States, there can be no state habeas corpus.[17]

State Criminal Jurisdiction Over Federal Officers.—Here sometimes arises an extremely delicate, sensitive question between federal and state authority, as has several times occurred. The police power of the state, broad as it is, must not infringe on the exercise of necessary powers of the federal government; for to allow this would, or might, disable it from performing efficiently the functions as-

[14] Whitten v. Tomlinson, 160 U. S. 242; Cuddy Case, 131 U. S. 280, 286.

[15] *In re* Burris, 136 U. S. 586.

[16] Ableman v. Booth, 21 How. 506.

[17] Tarbell's Case, 13 Wall. 397.

signed to it. Therefore the criminal law of the state can not apply to any person who, as an officer or agent of the national government, does an act as such, by color of his office. If his act is one aside from his office, not in colorable execution of, but really foreign to it, he is answerable to the state criminal code as anyone else; but in acting as an officer, though if he were not such the act would be an offense against the state, it is not such offense, it being done as such officer.

Davis was indicted for murder in Tennessee, but the act having been done in self-defense while acting as an internal revenue collector, the case was removed to the federal court for trial.[18] The court said: "The United States is a government with authority extending over the whole territory of the Union, acting upon the states and the people of the states. While limited in the number of its powers, it is, so far as its sovereignty extends, supreme. No state can exclude it from exercising them, obstruct its authorized officers against its will, or withhold from it, for a moment, the cognizance of any subject which the Constitution has committed to it. The general government must cease to exist whenever it can not enforce the exercise of its constitutional powers within the states by its officers and agents. If, when thus acting, within the scope of their authority, they can be arrested and brought to trial in a state court, for an alleged offense against state law, yet warranted by the federal authority they possess, and if the general government is powerless to interfere at once for their protection— if their pro-

[18] Tennessee v. Davis, 100 U. S. 257.

tection must be left to the action of the state court—the operations of the general government may at any time be arrested at the will of the state. No such weakness is to be found in the Constitution." Removal at once from the state to the federal court was justified. It was said that though after trial and affirmance of the conviction in the state courts, there might be a writ of error to the Supreme Court of the United States, that might be so slow as to disable the officer from acting, and thus prejudice the federal government in the administration of its duties; that the material consideration was not the individual right of the officer, but the public administration.

In *In re* Loney[19] a person was arrested in Virginia for perjury in depositions in a contested election for a member of Congress, and a writ of habeas corpus issued from a federal court, and the Supreme Court held that the "courts of a state have no jurisdiction of a complaint for perjury in testifying before a notary of the state upon a contested electon for the House of Representatives of the United States; and a person arrested on such complaint will be discharged on habeas corpus."

In *In re* Nagle[20] a deputy marshal was in custody of a sheriff in California charged with murder. He had killed Terry while Terry was assaulting Justice Field on his way to hold a federal court. The Supreme Court held that Nagle was lawfully released by the federal court in California from state custody, as he as marshal had the same power to keep the peace as a state sheriff, and was properly acting in defending the judge's life, and

[19] 134 U. S. 372.
[20] 135 U. S. 1.

acted as a marshal, and was not subject to state criminal law.

In *In re* Waite [21] is an able opinion justifying a habeas corpus to release from custody a pension officer of the United States who had been convicted by an Iowa court, and his sentence affirmed by the Supreme Court of Iowa, for an act done by color of his office.

In Ohio v. Thomas[22] an officer in a soldiers' home was arrested for a violation of state law in furnishing oleomargarine to inmates of a government institution, a soldiers' home, and he was discharged on habeas corpus. The court held that the state law had no application to the act done, as it was in virtue of federal authority.

In Tennessee v. Davis [23] a general statement of the respective powers of state and nation as to police is made. "Acts of Congress can not properly supersede police powers of the state, nor can the police powers of the state override national authority, as the powers of the state in that regard extend only to a just regulation of rights with a view to due protection and enjoyment of all; and if the police law of the state does not deprive anyone of that which is justly and properly his own; it is obvious that its possession by the state and its exercise for the regulation of the actions of their citizens can never constitute an invasion of national jurisdiction, or afford a basis for an appeal to the protection of the national authorities."

In Boske v. Comingore[24] it was held that the district

[21] 81 Fed. 359.
[22] 173 U. S. 276.
[23] 100 U. S. 301.
[24] 177 U. S. 459, 20 Sup. Ct. 701.

court could, on habeas corpus, direct the discharge of an officer of internal revenue service held in custody by the state, on the ground that his presence was necessary in discharge of his public duties, without waiting for the regular course in the state courts, and it was treated as an exception to the rule laid down in *Ex parte* Royall.

There is much strength in this reasoning to sustain federal supremacy over states in giving immunity against state action to federal officers for acts done as such; but the argument is not all on one side. Who is to say whether a federal officer acted really by virtue of his office? The federal courts say that they only are to decide this question. But if the officer did not so act, the state law is violated, and ought not the state to punish it? If any district or circuit court can any moment arrest the hands of the state, take from it a breaker of its laws, there is no end to the interruption, the harassment to state administration. Why not let the state go on? If a party acted really as an officer, his defense will, presumably, be accorded due weight; if he did not so act he is and ought to be punished. Shall we assume in advance that the state will deny him his just defense. If it does so, there is an appeal to the Supreme Court. Shall there be in the state two or more federal courts to veto the state power? This would detract from the dignity and capacity of the states. There is no sovereignty in a state in this matter. If it be said that there may be delay, that can equally be said in all other cases. And the state officer does not enjoy this immunity; for even a state judge acting as such in the selection of jurors is indictable for wrongfully excluding colored jurors in violation of the

Civil Rights Act. But it was claimed that he was exercising a merely ministerial function, not a judicial one, and it was not claimed that the federal government could indict a state judge for the exercise of a judicial act.[25] But the question remains, Who is to say whether the act is judicial? The clear-cut fact is that the state officer is prosecuted in the federal court for an act claimed to be done in the exercise of his judgment as a state officer. Did the Fourteenth Amendment intend to confer on the federal government power to prosecute for crime persons colorably exercising state function? Before that amendment it seems that it could not do so. In Kentucky v. Dennison[26] a unanimous court held that though the federal Constitution made it the "duty" of one state to surrender fugitives from justice it was merely a moral duty, and Congress could not coerce its performance by a governor—could not enforce it upon the state by operating upon the officer. But it is held in *Ex parte* Virginia, just cited, that it is the Fourteenth Amendment that gives this power to the federal government, that is the power involved in that case. See Justice Field's opinion in the same case, and opinion in the Civil Rights Case.[27]

I should remark that the power exercised by the national courts to take from state courts persons under prosecution for acts done as federal officers does not emanate from the Fourteenth Amendment, but from a power inherent in the nation to restrain state action that cripples

[25] *Ex parte* Virginia, 100 U. S. 339.
[26] 24 Howard, 66.
[27] 109 U. S. 3.

or destroys capacity in the general government to execute its functions. But the state does not possess power, by habeas corpus, to take from the custody of the federal courts an officer of the state who may, in acting as such, be charged with violating federal law.[28]

Appeal in Habeas Corpus.—A prisoner defeated in habeas corpus, based on alleged violation of his rights under the Fourteenth Amendment, can go, by writ of error, to the Supreme Court of the United States from the judgment of the highest state court. It involves a question under the Constitution.[29] But suppose a state prosecuting a malefactor against its laws is wronged by discharge of a prisoner by a circuit court of the United States. What is the state's redress? For a time it had no redress; but under Section 5, Act March 3, 1891,[30] the state may of right go by writ of error into the Supreme Court of the United States, because that act gives appeal "in any case that involves the construction or application of the Constitution of the United States."[31]

Mandamus from Federal to State Court.—Does it lie? The question has not been answered by decisions definitely. Suppose the United States Supreme Court, in the exercise of an appellate jurisdiction, which no one now questions, reverses a decision of the highest court of a state, and the state court either from misconstruction of the federal decision, or in willful disregard of it, does not execute the mandate of the Supreme Court, or departs

[28] Ableman v. Booth, 21 How. 506.
[29] Cook v. Hart, 146 U. S. 183; Parsons v. District, 170 U. S. 45.
[30] 26 U. S. Stat. Chap. 517, page 827.
[31] Harkrader v. Wadley, 172 U. S. 148.

from it in its further proceedings; what is the remedy of the suitor? There is no question but that if the state court's further action departs from what the United States Supreme Court directed or the principles of its decisions require, an appeal again lies. No doubt, either, that the Supreme Court may issue its own process to a federal marshal and thus execute its judgment where that is appropriate, that is, where such process, from the nature of the judgment, will accomplish all that the judgment contemplates. This was done in the case of Martin v. Hunter,[32] where the Virginia Court of Appeals denied power in the United States Supreme Court to mandate it, and refused to comply with the mandate, the Supreme Court reversed the refusal, and issued its own execution. But the present question is, Can the Supreme Court issue a mandamus to compel the highest court of a state to execute its decision? I should answer in the affirmative, simply because the federal Supreme Court having undoubted appellate power over the state courts, it necessarily follows that it must be able, by a process of its own, to effectuate its judgment.[33] If this is not so, here is right in a citizen without remedy; a function in a court assigned by law incapable of enforcement. It is said that a court of one government can not issue a mandamus to a court of another. That is true; but the highest law gives appeal to the national Supreme Court, and in this particular instance, for this particular purpose, makes the two courts the same as if they were courts

[32] 1 Wheat. 304.
[33] *In re Green*, 141 U. S. 325.

of the same government. There can be no question that a federal supreme or superior court may award a mandamus to compel an inferior federal court to obey its decision; and likewise may a supreme or superior state court compel an inferior state court. I assimilate them for the question in hand. But I do not think that any but the United States Supreme Court can issue a mandamus to a state court. The Supreme Court has left the question open. It strongly and properly declares, through Chief-Justice Fuller, in *In re* Blake,[34] that the process by mandamus would be, in such case, "a mode of redress very likely to lead to jealousies and collisions between the state and general governments of a character anything but desirable", and in the case it refused a mandamus, because a writ of error to correct the state court would answer all purposes.

In Martin v. Hunter, *supra,* the same course of proceeding by writ of error, upon refusal of the state court to follow the Supreme Court, was adopted. By a later case just out, where a federal court refuses to obey, there can be mandamus; but if it goes on and later commits error, a writ of error, not mandamus, is proper to correct the error in matter not passed on before.[35]

The fourteenth section of the Judiciary Act gives the Supreme Court power to issue any writ necessary to execute its jurisdiction. I do not see why mandamus would not lie to compel a state court.[36] But it only lies where writ of error or other course will not be ad-

[34] 175 U. S. 114, 20 Sup. Ct. 42.
[35] *Ex parte* Union Steamboat Co. 178 U. S. 317, 20 Sup. Ct. 904.
[36] *Ex parte* Union Steamboat Co. 178 U. S. 317, 20 Sup. Ct. 904.

equate.[37] It does not lie to compel a state court to restore a disbarred attorney.[38] But this does not answer the question. Section 688 Revised Statute only gives mandamus from Supreme to lower federal, not state, courts. I know of no statute authorizing it to state courts.

[37] *Ex parte* Union Steamboat Co. 178 U. S. 317, 20 Sup. Ct. 904; *Re* Atlantic City R. Co. 164 U. S. 633; *Re* Pennsylvania Co. 137 U. S. 451; *Re* Morrison, 147 U. S. 14.

[38] *In re* Green, 141 U. S. 325.

Chapter 21.

CONGRESSIONAL INTERVENTION.

We have been discussing the means and mode by which the federal government may vindicate the Fourteenth Amendment. We have seen what extensive jurisdiction and powers are vested in the federal courts to enforce the provisions of the Fourteenth Amendment. We must not forget that another department of the national government has a jurisdiction and power over the states for its enforcement which are broad and mighty, the exact boundaries of which have not been very definitely settled. I mean the power of Congress. The fifth section of the Fourteenth Amendment says: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." What is the scope of this power of Congress? Where are its limits? In what cases, in what manner, is it to be exercised? The section does not say, could not say. When Congress may intervene, or how, to curb state action by its legislation this section does not say; but that it has this power no one can question. Clearly it is with Congress, in the first instance, to say, to legislate, subject only to the power of the federal judiciary, in the end,

to say whether its legislation falls within the circumference of "appropriate legislation" mentioned in section 5.

Away back in 1842, under the clause of the Constitution that no person held to service in one state escaping into another should be discharged by the law of the state of refuge, "but shall be delivered up, on claim of the party to whom such service or labor is due," the question was as to the power of the nation to enforce this mandate, and the Supreme Court said: "The fundamental principle applicable to all cases of this sort would seem to be that where the end is required, the means are given; and where the duty is enjoined, the ability to perform it is contemplated to exist on the part of the functionaries to whom it is entrusted."[1]

"Congress have, on various occasions, exercised powers which were necessary and proper, as means to carry into effect rights expressly given and duties expressly enjoined by the Constitution. The end being required, it has been deemed a just and necessary implication that the means to accomplish it are given also; or, in other words, that the power flows as a necessary means to accomplish the ends."[2]

There no plain, express power was given; only an implied one; whereas the amendment gives, in words, wide power; the means to accomplish it are given also, not by implication, but by expression. Therefore it seems plain that all the means stated in this early expression

[1] Prigg v. Commonwealth of Pennsylvania, 16 Peters, 542.

[2] Prigg v. Commonwealth of Pa. 16 Peters, 542; Robb v. Connolly, 111 U. S. 624.

of the Supreme Court just quoted are exercisable by Congress under the fifth section.

Under the clause of the Constitution quoted the Fugitive Slave Act was passed, and, under the principles of power by implication just stated, it was held valid.[3]

In another case[4] the court said: "While certain fundamental rights, recognized and declared, but not created or granted, in some of the amendments, are thereby guaranteed only against violation or abridgment by the United States or the states, as the case may be, and can not therefore be affirmatively enforced by Congress against unlawful acts of individuals; yet every right created by, arising under, or dependent upon, the Constitution of the United States, may be protected and enforced by Congress by such means and in such manner as Congress, in the exercise of the correlative duty of protection, or of the legislative powers conferred upon it by the Constitution, may in its discretion deem most eligible and best adapted to attain their object."

In a great case, *Ex parte* Virginia,[5] the court said: "We held that this protection and this guaranty, as the fifth section of the amendment expressly ordains, may be enforced by Congress by means of appropriate legislation. All the amendments derive their force from this latter provision. It is not said that the judicial power of the general government shall extend to enforcing the prohibitions and protecting the rights and immunities guaranteed. It is not said that branch of

[3] Ableman v. Booth, 21 How. 506.
[4] Logan v. U. S. 144 U. S. 293.
[5] 100 U. S. p. 345.

the government shall be authorized to declare void any action of a state in violation of the prohibitions. It is the power of Congress which has been enlarged. Congress is authorized to enforce the prohibitions by appropriate legislation. Some legislation is contemplated to make the amendment fully effective. Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against state denial or invasion, if not prohibited, is brought within the domain of congressional power. Nor does it make any difference that such legislation is restrictive of what the state might have done before the constitutional amendment was adopted. The prohibitions of the Fourteenth Amendment are directed to the states, and they are to a degree restrictions of state power. It is these which Congress is empowered to enforce, and to enforce against state action, however put forth, whether that action be legislative, executive or judicial. Such enforcement is no invasion of state sovereignty. No law can be, which the people of the state have, by the Constitution of the United States, empowered Congress to enact. . . . Such legislation must act upon persons, not upon the abstract thing denominated a State, but upon the persons who are agents of the state in the denial of the rigths which were intended to be secured. The argument in support of the petition for habeas corpus ignores entirely the power conferred upon Congress by the Fourteenth Amendment. Were it not for the fifth

section, there might be room for the argument that the first section is only declaratory of the moral duty of the state, as was said in Commonwealth of Kentucky v. Dennison, 24 How. 66. The act under consideration in that case provided no means to compel the execution of the duty required by it, and the Constitution gave none. It was of such an act that Mr. Chief-Justice Taney said, that any punishment for neglect or refusal to perform the duty required by the act of Congress 'would place every state under the control and dominion of the general government, even in the administration of its internal concerns and reserved rights.' But the Constitution now expressly gives authority for congressional interference and compulsion in the cases embraced within the Fourteenth Amendment. It is but a limited authority, it is true, extending only to a single class of cases; but within its limits, it is complete. The remarks of Chief-Justice Taney in Kentucky v. Dennison and Collector v. Day, though entirely just as applied to the cases in which they were made, are inapplicable to the case we now have in hand." In the case from which I have just quoted it was held that a state judge could be punished in a federal court under a federal statute for excluding jurors on account of color.

"A right, whether created by the Constitution, or only guaranteed by it, even without express delegation of power, may be protected by Congress. Prigg v. Commonwealth, 16 Peters 539."[6]

[6] Strauder v. West Virginia, 100 U. S. p. 310.

"Rights and immunities created by or dependent upon the Constitution of the United States can be protected by Congress. The form and manner of the protection may be such as Congress, in the legitimate exercise of legislative discretion, may provide. These may be varied to meet the necessities of the particular right to be protected."[7]

One of the modes of protection is the removal from state to federal courts of suits involving such rights under the Fourteenth Amendment.[8]

"Every addition of power to the general government involves a corresponding diminution of the governmental power of the states. It is carved out of it."[9] The Fourteenth Amendment is a vast diminution of state power.

The Civil Rights Cases[10] must be regarded under this head as leading and guiding authority. The holding of the court was: "The Fourteenth Amendment is prohibitory upon the states only and the legislation authorized to be adopted by Congress for enforcing it is not *direct* legislation on the matters respecting which the states are prohibited from making or enforcing certain laws, or doing certain acts, but is corrective legislation, such as may be necessary or proper for counteracting and redressing the effect of such laws or acts." Justice Bradley delivered a very able opinion, the effect of which is that it is state action of a particular character that is prohibited by the amendment, individual invasion of

[7] U. S. v. Reese, 92 U. S. 214.
[8] Strauder v. W. Va. 100 U. S. p. 311.
[9] *Ex parte* Virginia, 100 U. S. p. 346.
[10] 109 U. S. 3.

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individual rights not being the subject matter of the amendment. It nullifies all state legislation and action of every kind which impairs the privileges and immunities of citizens of the United States, or injures person in life, liberty or property, or denies them the equal protection of the laws. It not only does this, but in order that the national will may not be mere *brutum fulmen,* the last section gives Congress power to enforce it by appropriate legislation for correcting the effect of prohibited state laws and action, and thus render them void and innocuous. This is the power conferred upon Congress, and this the whole of it. It does not invest Congress with power to legislate upon subjects within the domain of state legislation; but to provide modes of relief against state legislation or action of the kind referred to. It does not authorize Congress to create a code of municipal law for the regulation of private rights; but only to provide modes of redress against the operation of state laws, and the action of state officers, executive or judicial, when subversive of the fundamental rights specified in the Fourteenth Amendment.

Positive rights and privileges are undoubtedly secured by the amendment; but they are secured by way of prohibition against state law and proceedings, and power is given Congress to carry such prohibition into effect; and its legislation must be predicated upon such supposed laws or state proceedings, and be directed to the correction of their operation and effect. To show his meaning Justice Bradley cited the provision prohibiting states from impairing the obligation of contracts, and he said that this did not give Congress power to provide for

general enforcement of contracts, nor power to invest federal courts with jurisdiction over contracts, so as to enable parties to sue upon them in those courts; but it did give power to provide remedies by which impairment of contracts by state law might be counteracted; that the remedy which Congress had provided was an appeal from the state courts to the Supreme Court, where the state courts upheld a statute alleged to impair such contract; and that no attempt was made to draw into federal courts litigation over contracts generally. He further said that some obnoxious state law passed, or that might be passed, is necessary to be assumed, in order to lay the foundation of any federal remedy in the case, for the reason that the prohibition was against state *laws* impairing contracts. "And so in the present case, until some state law has been passed, or some state action through its officers or agents has been taken, adverse to the rights of citizens sought to be protected by the Fourteenth Amendment, no legislation of the United States under said amendment, nor any proceeding under such legislation can be called into activity; for the prohibitions are against state laws and acts done under state authority. Of course legislation may, and should be, provided in advance to meet the exigency when it arises; but it should be adapted to the mischief and wrong which the amendment was intended to provide against, and that is state action or laws of some kind adverse to the rights of the citizen secured by the amendment. Such legislation can not properly cover the whole domain of rights appertaining to life, liberty and property, defining them and providing for their vindication. That would be to establish

a code of municipal law regulative of all private rights between man and man in society. It would be to make Congress take the place of state legislatures, and supersede them. It is absurd to affirm that because the rights of life, liberty and property (which include all civil rights that men have) are by the amendment sought to be protected against invasion on the part of the state without due process of law, Congress may therefore enact due process of law in every case; and that because denial by a state to any person of the equal protection of the law is prohibited, therefore Congress may establish laws for their equal protection. In fine, the legislation which Congress is authorized to adopt in this behalf is not general legislation upon the rights of the citizen, but corrective legislation, that is, such as may be necessary for counteracting such laws as states may adopt, and which, by the amendment, they are prohibited from making, or such acts and proceedings as the state may commit or take, and which, by the amendment, they are prohibited from committing or taking."

The opinion is a very luminous deliverance by a very able judge, who can not be accused of undue pro-state partiality. It is as clear a statement of general principles as can be made. It seems to be sound. It asserts what is important, initial and cardinal in the application of the Fourteenth Amendment, that it is not an affirmative, positive, original grant of power to the nation, or of original legislation to Congress over privileges and immunities, life, liberty, property, equality, like that given to the nation to regulate foreign and interstate com-

merce. It is prohibitory only. Congress can not grant rights of life, liberty or property, or originally say what they are or shall be, or deny them, or regulate them by police regulations or otherwise. These matters pertain to state authority, state autonomy, local self-government. The body of law touching them must come from the state, and it is only when the state assails them without due process that the power of Congress comes in. Can Congress pass an act anticipatory of wrongs against the amendment? It may do so, provided it be not general legislation or regulation on the subject, but prohibitive of those things which, if done, prejudice the rights mentioned in the amendment. We might say that Congress, in case of a given act of a state legislature, might pass an act declaring it void; yet this would be unheard of. No doubt, Congress can provide ample remedies through the federal judiciary, to correct violations of the amendment that may occur. It has done so in an act[11] giving jurisdiction to circuit courts of cases arising under the Constitution or laws of the United States, and by appeal to the Supreme Court of the United States, and by removal of suits involving such rights from state to federal courts. These remedies have proven adequate for a long time, and will likely continue to do so; but beyond question Congress can change and enlarge them, from time to time, to meet changing circumstances or exigencies. The fault found by the Supreme Court with the Civil Rights Act was that it was original legislation, originating rights, declaring that all

[11] Rev. Stat. Sec. 629; Act 13, March, 1887.

persons should be entitled to full and equal enjoyment of the accomodations, advantages, facilities and privileges of inns, public conveyances, theaters and other places of public amusement, subject only to the conditions and limitations established by law, and applicable alike to all citizens of every race and color. This was simply and purely state legislation. Such powers, notwithstanding the amendment, still remain with the states. Just such an act by a state was held constitutional, properly so, because it was within the state power of legislation.[12]

It may cast light upon the proper construction of the fifth section of the amendment to say that when that amendment was proposed in Congress, a clause was proposed reading thus: "Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each state all the privileges and immunities of citizens in the several states, and to all persons in the several states equal protection in the rights of life, liberty and property." It was rejected. That rejection sheds light on the meaning of what was adopted. Had that clause been adopted, the amendment would mean more than it does. It would have given Congress power to do what the Supreme Court in the Civil Rights Cases says it has no right to do. It would have given Congress power of affirmative legislation, such as it has in regard to commerce, to make laws, original power to make laws touching rights which the people of the states have, under state laws, covering immunities, privileges. life, liberty, property and equality; in short, to

[12] Donnell v. State, 48 Miss. 661.

make a code of regulation, of governing law, as to these matters, which, as Justice Bradley, in those cases, said cover everything of value which man has; but as adopted, the powers of Congress under the amendment are only vetoing, corrective, restricting, nullifying bad laws and action of the states denying those rights.

These principles are exemplified in another case,[13] which involved the question whether section 5519, Revised Statutes, was congressional legislation warranted by the Fourteenth Amendment. That section provided that if persons conspired or went in disguise upon highways in any state or on premises of another, to deprive any persons, or class of persons, of the equal protection of the laws, or of equal privileges or immunities, or to prevent or hinder the authorities of a state from giving all persons equal protection of the laws, they should be fined or imprisoned. The act was held not warranted by the Fourteenth Amendment. It was simply state legislation creating and punishing crime committed by individuals, not legislation to antidote state action. "It is perfectly clear," says the opinion by Justice Wood, "that its purpose also was to place a restraint upon the action of the states. In the Slaughter House Cases, 16 Wall. 36, it was held by the majority of the court, speaking by Mr. Justice Miller, that the object of the second clause of the first section of the Fourteenth Amendment was to protect from the hostile legislation of the states the privileges and immunities of citizens of the United States. In the same case the court said that 'if the states do not

[13] U. S. v. Harris, 106 U. S. 629.

conform their laws to its requirements, then by the fifth section Congress was authorized to enforce it by suitable legislation.'" The opinion of Justice Bradley, in U. S. v. Cruikshank,[14] was quoted with approval: "It is a guaranty of protection against the act of the state government itself. It is a guaranty against the exertion of arbitrary and tyrannical power on the part of the government and legislation of the states, not a guaranty against the commission of individual offenses; and the power of Congress, whether expressed or implied, to legislate for the enforcement of such guaranty does not extend to the passage of laws for the suppression of crime within the state. The enforcement of the guaranty does not require or authorize Congress to perform the duty that the guaranty itself supposes it to be the duty of the state to perform, and which it requires the state to perform." Again, in the Cruikshank Case[15] and Virginia v. Rives,[16] the amendment was declared to operate on the state, not individuals, and this forbids all idea that Congress could legislate on the subjects mentioned in the amendment, except against adverse state action. The words of the amendment are, "no state shall" do certain things, showing unmistakably that it is not general legislation by Congress that is meant, legislation creating, defining, enlarging, limiting, or regulating civil personal rights, or creating and punishing crime in the first instance. Congress can only, by proper legislation, render harmless hostile legislation or actions of states.

[14] 1 Wood, 308.
[15] 92 U. S. 542.
[16] 100 U. S. 313.

Where Congress has not merely prohibitory power, but affirmative, original power given up to it by the states, as to regulate commerce, coin money, carry mail, lay tariff, it is different, it is vested with power of general legislation on those subjects. The case of U. S. v. Reese[17] was upon the Fifteenth Amendment, but illustrates the same view. Congress had passed an act making it an offense for any officer of an election to wrongfully refuse to receive or count a vote, or for any person, by force, bribery or unlawful means, to hinder a citizen from voting at any election. If the act had punished those who deprived a man of his right to vote "on account of race, color or previous condition of servitude," it might have been justified by the Fifteenth Amendment; but it was general legislation against depriving anyone on any score of his vote, not legislation to meet the wrong of depriving one of a vote "on account of race, color or previous condition of servitude," and it was only legislation having that end in view that was "appropriate legislation" under amendment Fifteen. The act was held unconstitutional.

In Baldwin v. Franks[18] the statute involved in U. S. v. Harris[19] was again held not warranted by Amendment Fourteen on the same principles. It was also held that Congress could pass laws to punish anyone for depriving Chinese of rights guaranteed by treaty. This was because the full treaty making power is given to the nation, and a treaty is federal law, and Congress may punish

[17] 92 U. S. 214.
[18] 120 U. S. 678.
[19] 106 U. S. 629.

wrongs against that law. This again illustrates the contrast between such legislation and that appropriate to make good the Fourteenth Amendment. So it must not be thought that *Ex parte* Yarbrough[20] militates against this doctrine, or any case holding valid legislation of Congress based on affirmative grants of power to the union.

[20] 110 U. S. 665.

Chapter 22.

EMINENT DOMAIN.

"Eminent domain is the power of the state to apply private property to public purposes on payment of just compensation to the owner."[1] This tells at once what a mighty power this is. By it the state seizes the citizen's property, takes it from him against his will, and applies it to the public use in making highways, railroads and other things for public use. "The right to exercise the power of eminent domain is inherent in sovereignty, necessary to it, inseparable from it. From the very nature of society and organized government this right must belong to the state," without mention in the Constitution.[2] The present work is not designed to discuss this important subject further than as to how far the Fourteenth Amendment bears upon it. The power existed in the Colonies when they became independent. The Fourteenth Amendment found, when it came, an established process resident in the states, by which alone the state could condemn, for public want and purposes, the citizen's private property. It was thus usual, established, due process in

[1] U. S. v. Jones, 109 U. S. 518.
[2] Mississippi Boom Co. v. Patterson, 98 U. S. 403.

this respect, and therefore can not fall under the brand of that amendment, and lives yet regardless of it. The federal Constitution says, in its Fifth Amendment, that private property shall not be taken for public use without just compensation; but that restrains only the federal government, not the states—so much so that when it was alleged that private property was being invaded by an act of the Mississippi legislature for public use, without compensation, and an appeal was made to the United States Supreme Court for protection, it was held that even if the state constitution did declare that private property should not be taken for public use without compensation, and the state court had sustained the act, the Supreme Court had no power to review the decision.[3] This function, to protect its citizens against improper exercise of the power, was alone with the states.[4] Those cases were before the Fourteenth Amendment; but it has not impaired this power of the states.[5] The United States can not interfere with the exercise by the state of her right of eminent domain in taking for public use land within her limits which is private property.[6] Still, some cases have gone to the Supreme Court upon the contention that the Fourteenth Amendment was violated by the state, as almost any action of the states may now be charged.

"This court has authority to re-examine the final judgment of the highest court of a state in a proceeding to

[3] Withers v. Buckley, 20 How. 84.
[4] Mills v. St. Clair, 8 How. 569.
[5] Wilson v. B. & P. R. R. 5 Del. Ch. 524.
[6] Boom Co. v. Patterson, 98 U. S. 403.

condemn private property for public use, in which, after verdict, a defendant assigned as ground of new trial that the statute under which the case was instituted and the proceedings under it were in violation of the clause of the Fourteenth Amendment, forbidding a state to deprive any person of property without due process of law, which ground of objection was repeated in the highest state court; provided the judgment of the court, by its necessary operation, was adverse to the claim of federal right, and could not rest on any independent ground of local law. The contention that the defendant had been deprived of property without due process of law is not entirely met by the suggestion that he had due notice of the proceedings, appeared and was admitted to make defense. The judicial authorities of a state may keep within the letter of the statute prescribing forms of procedure in the courts, and give the parties interested the fullest opportunity to be heard, and yet it might be that its action would be inconsistent with that amendment. A judgment of a state court, even if authorized by statute, whereby private property is taken for public use without compensation, made or secured to the owner, is, upon principle and authority, wanting in due process of law required by the Fourteenth Amendment. . . In a proceeding in a state court for condemnation of private property for public use, the court having jurisdiction of the subject-matter and parties, the judgment ought not to be held in violation of due process of law enjoined by the Fourteenth Amendment, unless some rule of law was prescribed for the jury that was in absolute disregard of

the right of just compensation."[7] We have said that this power of eminent domain is original in the states, unimpaired by the Fourteenth Amendment, and some have asserted the power of the state to condemn property to public use without any compensation, and certainly before the Fourteenth Amendment the federal government could not have prevented it; but the case just cited does explicitly say that the state under the amendment must provide for compensation. It utterly denies the power of the state, were it to attempt to do so, to take property for public use without compensation. Likewise other cases.[8] In the last case complaint was made that possession was taken pending the proceeding, before final adjudication as to compensation; but the court held that as the state constitution allowed property to be taken when compensation was either "paid or secured," it would follow the state court in holding the provision valid, and that possession could be taken during the litigation as to the amount of compensation, if compensation was adequately made or secured. So in Cherokee Nation v. Kansas Railway.[9]

In the Backus case just cited it was held that as regards what court should determine the question of compensation or the form of procedure, all that is essential is that "in some appropriate way, before some properly constituted tribunal, inquiry shall be made as to the amount of compensation; and when this is provided for

[7] C. B. & Q. R. R. v. Chicago, 166 U. S. 226.

[8] Searl v. School District, 133 U. S. 553, 562; Sweet v. Rechel, 159 U. S. 380, 398; U. S. v. Jones, 109 U. S. 513; Backus v. Fort Street Co. 169 U. S. 557.

[9] 135 U. S. 659.

there is that due process of law which is required by that amendment." The case also held that the settled rule of the court in cases for the determination of the amount of damages is that it adopts the construction placed by the Supreme Court of the state upon its own constitution and laws. In another case, Long Island Water Supply Company v. Brooklyn,[10] it is held that the compensation may be made by commissioners, whose report may be made final, if the statute so provide, leaving it open to the courts to inquire whether there was any erroneous basis adopted by the commissioners in the appraisal, or other errors of proceeding, and it was not essential that there should be a jury to assess damages. The same doctrine that it is not material what form of procedure is adopted by state law, if it provide for compensation and opportunity to be heard, is held in Lent v. Tillson.[11]

"There is no vested right in a mode of procedure established by state law for the condemnation of property for public use; but each succeeding legislature may establish a different one, provided only that in each is preserved the essential element of protection."[12] In the last case it is held: "The question of necessity for taking property is not one of judicial character, but rather one for determination of the law-making branch of the government. Boom Co. v. Patterson, 98 U. S. 403; U. S. v. Jones, 109 Id. 513; Cherokee Nation v. Kansas Railway, 135 Id. 641."

[10] 166 U. S. 685.

[11] 140 U. S. 316.

[12] Backus v. Fort Street Co. 169 U. S. 557; Monongahela Co. v. U. S. 148 U. S. 312.

In Sweet v. Rechel[13] it was held that to abate a nuisance to preserve health an act may authorize a city to take and fill up land, and provide for payment through judicial proceedings, and that it was valid, and the fee passed to the city, and the owner was only entitled to reasonable compensation, to be ascertained in the manner provided by the act.

Condemning a Franchise.—A franchise and property entire of a chartered corporation supplying a city under contract with water may be condemned for public use of the city, under power of eminent domain, on payment of compensation, including compensation for the termination of the contract. Though the contract was a contract, it too, like any other property, was subject to be impaired and destroyed under the power of eminent domain.[14]

Not for Private Use.—In another connection, to which I refer, (p. 163) I have stated fully that the power of eminent domain can be exercised for public purposes only, and that it is a misapplication of that power, and unconstitutional, to condemn one man's property for the merely private use of another. This is fully shown in an opinion by Justice Harlan in Chicago, Burlington & Quincy R. R. Co. v. Chicago.[15]

The United States has Power of Eminent Domain to enable it to carry out the functions assigned to it, and can condemn land within the states for its purposes.[16] This

[13] 159 U. S. 380.

[14] Long Island Water Co. v. Brooklyn, 166 U. S. 685; Newburyport Water Co. v. City, 103 Fed. 584.

[15] 166 U. S. 235. So Missouri Co. v. Nebraska, 164 U. S. 403.

[16] Cherokee Nation v. Kansas Railway, 135 U. S. 641; Kohl v. U. S. 91 U. S. (1 Otto), 367.

gives right to condemn for postoffices, forts, arsenals, dockyards, naval ations—for any purpose within its functions.

Appeal to United States Supreme Court in Condemnation Cases, just as in other civil cases, from judgments of the highest courts of the states.[17]

[17] C. B. & Q. Co. v. Chicago, 166 U. S. 226.

Chapter 23.

GOVERNMENT BY INJUNCTION.

This is the term or name of late given to the exercise by courts of equity of the process of injunction to prevent interference by large bodies of workmen, in periods of trouble between large manufacturing and transportation establishments and corporations, on the one hand, and their employees and those sympathizing with them, on the other hand, with the property or business of such establishments or corporations, by boycotts, strikes, inducing laborers to quit service, or not to engage in the business, of the establishments named. Injunctions have of late been very widely used in such instances, and have excited widespread popular excitement and strong animadversion upon the courts, and such injunctions have been denounced as nothing less than "government by injunction," and unconstitutional, because denying the rights of jury trial. Persons violating such injunctions have been imprisoned for so doing, without jury trial as guilty of contempt of the injunction process. The only question is, Does injunction lie in such cases? The courts have decided that it does; that these combinations of men in large numbers, in some instances many thousands of men,

stopping railroads and impeding transit thereon, or interfering with other means of transportation, such as shipping, are public nuisances and subject to restraint by injunction from ancient times. The courts have also decided that when such bodies of men obstruct individuals or large manufacturing or industrial corporations, such as those mining coal or iron, or manufacturing iron or other things in which are invested large amounts of capital, and involving large property interests of individuals and corporations, they work irreparable injury to private property and business, and, being carried on by innumerable persons, most of whom are unknown, any remedy by suits against individuals would involve infinite multiplicity of suits and give inadequate remedy, and that for these, and other reasons applicable to particular cases, the remedy by injunction is the only adequate one. Many cases have of late arisen under this head. It is not for this work to discuss them, except only as they hold that the application by injunction does not deprive them of due process of law. Upon this important and grave subject I cite some of the cases.[1]

[1] U. S. v. Debs, 64 Fed. 724; Consol. Steel Wire Co. v. Murry, 80 Fed. 811; Phelan Case, 62 Fed. 803; Crump v. The Commonwealth, 84 Va. 927; 23 S. E. 760, 10 Am. St. R. 895; Oneal v. Behanna, 182 Pa. St. 236; 61 Am. St. R. 702, and full note; Mayer v. Journey Stone Cutters, 47 N. J. Eq. 519, 20 Atl. 492; Casey v. Cincinnati Typo. Union, 45 Fed. 135; Toledo, etc., Co. v. Pa. Co. 54 Fed. 730; Vegelan v. Gunner 167 Mass. 92; Coons v. Christie, 53 N. Y. S. 668, 24 Miscel. R. 296; Matthews v. Shankland, 56 N. Y. S. 123, 25 Miscle. R. 604; McCall v. Ratchford, 82 Fed. 41; U. S. v. Sweeny, 95 Fed. 434; U. S. v. Elliott, 64 Fed. 27, 1 Am. & Eng Dec. Equity, 590 and note; Cœur D'Alene Consol. Co. 51 Fed. 260; Hopkins v. Oxley, 49 U. S. App. 709, 83 Fed. 912; Arthur v. Oakes, 24 U. S. App. 239, 63 Fed. 310, 25 L. R. A. 414; Cook Trade and Labor Combin. 77; Cogley on Strikes and Lockouts, 248, 296, 342; U. S. v. Patterson, 55 Fed. 605.

Contempt of Such Injunctions.—The courts having held that injunction lies in such cases as those above mentioned, of course a violation of such injunction constitutes contempt, as it would in case of violation of any other lawful process. It was strenuously contended that in proceedings for such contempt, the demand found in federal and state constitutions that no one should be deprived of life, liberty or property without due process of law, called for jury trial, as the cases involved liberty. The jurisdiction in equity to award injunction being granted or established by decision, I am unable to see how the demand for a jury can be sustained; for, as abundantly appears by authority, the jurisdiction in equity is as old as the hills, where it attaches, and equity proceeds without jury, the chancellor deciding on law and fact, according to old practice, and therefore no jury is demandable in the main injunction suit. But how as to the contempt proceeding, a separate one from the injunction, a criminal proceeding? As elsewhere shown (p. 162), for centuries before the Fourteenth Amendment or of the formation of the Union, all courts possessed the inherent power to vindicate their authority and jurisdiction against contempt and resistance, by summary proceedings without jury, except where statute otherwise directed, as a matter of necessity, else their judgments would be mere vapor.[2]

In a great and historic case[3] growing out of the celebrated Pullman sleeping car strike at Chicago, the United States Supreme Court considered this question, and held

[2] State v. Frew, 24 W. Va. 416; *Ex parte* Robinson, 19 Wall. 505.
[3] *In re Debs*, 158 U. S. 564.

that in all courts there resides authority inherent to punish for contempt, without intervention by any other authority, be it court or jury, it being sole judge of the existence or non-existence of contempt, without jury, and that there is no constitutional right of jury trial in the case. The court, by Justice Brewer, discussed the question learnedly. It referred to the statement made in a prior case:[4] "If it has ever been understood that proceedings according to the common law for contempt have been subject to the right of trial by jury, we have been unable to find any instance of it." Reference was also made to another case approvingly, which held that "it can not be supposed that the question of contempt of the authority of a court of the United States, committed by a disobedience of its orders, is triable, of right, by a jury."[5]

[4] Eilenbecker v. Plymouth, 134 U. S. 36.
[5] Interstate Commerce v. Brimson, 154 U. S. 489.

Chapter 24.

INTERSTATE COMMERCE.

What has this to do with the Fourteenth Amendment? Strictly speaking, nothing. However, the Fourteenth Amendment protects against state action liberty and guarantees the equal protection of the law. In preceding pages we have impressed the principle that this guaranty covers the right to labor and gain a livelihood, to buy, to trade, to sell, to contract; but while these clauses are in the Constitution, not only in the Fourteenth Amendment, but also in the Fifth, and thus these rights are protected against improper adverse action by both national and state governments, we must remember that they are to be read along with another important provision, that giving Congress power "To regulate commerce with foreign nations, and among the several states, and with the Indian tribes." Does the Fourteenth Amendment repeal, as to liberty of contract, this provision incorporated in the Constitution eighty-five years before that amendment? It certainly does not, because the amendment does not relate to the power of the national government. Does the Fifth Amendment? It plainly was not so intended. How does this commerce clause affect the right of the citizen to con-

tract, to buy and sell and trade under the liberty clause of the Constitution? The Supreme Court has said that the provision in the Constitution "regarding the liberty of the citizen is to some extent limited by this commerce clause; and the power of Congress to regulate interstate commerce comprises the right to enact a law prohibiting the citizen from entering into those private contracts which directly and substantially, not merely indirectly, remotely, incidentally and collaterally, regulate, to a greater or less degree, commerce among the states."[1] Therefore, when we talk about the right of contract under the liberty clauses of the Constitution we must inquire whether the contract, or transaction, or combination interferes with interstate commerce; that is, directly and substantially interferes therewith. It thus becomes appropriate to ask, What is commerce among the several states, commonly called interstate commerce? For it is an exclusive power of regulation and legislation which the Constitution accords to the nation over the rights of states and individuals; and the anti-trust act of Congress, July 2, 1890, declares: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor." These provisions prevent cor-

[1] Addyston Pipe Co. v. United States, 175 U. S. 211

porations and individuals from contracting, dealing or combining in such manner, and in those things, as will directly and substantially affect prejudicially such commerce. What is interstate commerce? "Interstate commerce consists of intercourse and traffic between the citizens or inhabitants of different states, and includes not only the transportation of persons and property and the navigation of public waters for that purpose, but also the purchase, sale and exchange of commodities."[2] Such being the general principles, it will only be necessary in each case to say whether the contract, combination or conspiracy does interfere with interstate commerce. In determining this we must have an eye to rules of test laid down by the Supreme Court. The cases involving this subject are infinite, in state and national courts, and it is impracticable to give them as instances; but the Supreme Court being the guiding and controlling forum in this matter, we may refer to some of the cases decided by it as illustrating the general principle. In the Addyston Case just referred to, the court said that under the commerce clause of the Constitution Congress "may enact such legislation as shall declare void and prohibit the performance of any contract between individuals or corporations where the natural and direct effect of such a contract shall be, when carried out, to directly, and not as a mere incident to other and innocent purposes, regulate to any extent interstate or foreign commerce." The court further said that under the act of Congress above referred to "any agreement or

[2] Addyston Pipe Co. v. United States, 175 U. S. 211. See also United States v. E. C. Knight Company, 156 U. S. 1; Hopkins v. United States, 171 U. S. 578

combination which directly operates, not alone upon the manufacture, but upon the sale, transportation and delivery of an article of interstate commerce, by preventing or restricting its sale, thereby regulates interstate commerce to that extent, and thus trenches upon the power of the national legislature, and violates the statute. When the direct, immediate and intended effect of a contract or combination among dealers in a commodity, is the enhancement of the price, it amounts to a restraint of trade in the commodity, even though contracts to buy it at the enhanced price are being made."

There have been numerous cases under this act. The Supreme Court has given it a very broad and salutary effect. A number of railroad companies formed an association, called the Trans-Missouri Freight Association, and made an agreement by which they were to have no competitive rates within a large area of country, but were to charge those rates agreed upon by their committee. It was claimed that the act of Congress related only to contracts relative to the manufacture and sale of commodities; but the court held that a contract to regulate rates of transportation fell within the act, as railroads engaged in interstate commerce, and their charges pertained thereto, and the combination was held one injuring trade as suppressive or depressive of competition, and that the act of Congress applied to all contracts in restraint of commerce without exception or limitation, and not merely to those in which the restraint is unreasonable.[3]

In another case[4] numerous railroad companies running

[3] United States v. Trans-Missouri, 166 U. S. 290
[4] United States v. Joint Traffic Assoc., 171 U. S. 505

from Chicago to the Atlantic formed an association, and agreed that it should have control over traffic passing certain points, and fix rates, and that no member of the association should deviate therefrom. They even agreed that the managers should have power to adopt a course of treatment for companies that were not members of the association for departure from those rates. The Supreme Court held the combination to be contrary to the act of Congress, and said that Congress "has power to say that no contract or agreement shall be legal, which shall restrain trade and commerce by shutting out the operation of the general law of competition." In both cases it was claimed that the agreements were for the mutual protection of the property of the companies from ruinous competition, to govern all by system and regulation conducive to business success, and entirely consonant with American liberty of contract and trade under the Constitution, and that the act of Congress was unconstitutional; but the validity of the act was sustained. In a later case[5] this attack upon the act was repeated with the same result of its upholdment. In this case a number of companies producing iron pipe combined in an association to raise prices over a large territory, and to sell their pipe only at prices agreed upon by their joint committee. The court declared anew the common law doctrine that all contracts to raise prices and restrain trade and competition are void, and that as the Constitution gave Congress authority to make all and any laws touching interstate commerce, it might condemn and avoid any contract hurting the free-

[5] Addyston Pipe Co. v. United States, 175 U. S. 211

dom of interstate commerce. Thus the constitutionality of such legislation by Congress so far, and only so far, as interstate commerce is concerned, is settled. But it seems that there could be no question of the power. The act was said to be against the liberty clause of Amendment V; but before it came, such a combination was void by common law, and as Congress is vested with full law-making power over the whole field of interstate commerce, it could prohibit such contracts, since that amendment was not intended to take away antecedent power in Congress.

Upon analogous principles we are authorized to say that state constitutions containing this liberty clause and the Fourteenth Amendment do not prohibit states from legislating against those combinations, trusts and agreements which had no validity or recognition by law before those constitutions were made. On pages 82, 130 and 371 I have stated the common law doctrine on this subject.

In what has been said it will be seen, in outline, what are the powers of Congress in condemning and punishing contracts, combinations, trusts, conspiracies and monopolies damaging interstate and foreign commerce. But what are the powers of the states as to their internal commerce? Just as wide as those of Congress as to interstate commerce, if not wider. The case of Addyston Pipe Company v. United States, just cited, limits the power of Congress to interstate and foreign commerce, conceding state power against those things damaging trade, commerce, business, open competition, within the states. On page 371 we showed how states may deal with such unlawful contracts, trusts and combinations, citing notable state cases defining what are condemnable contracts, com-

binations and trusts hurtful to trade and public welfare, they being practically in nature the same as those affecting interstate commerce; but this power in both national and state legislation to restrain freedom of contract is not illimitable; for if it were, what contract would not be subject to its influence? In United States v. Trans-Missouri Company[6] the declaration is very broad, that any contract or agreement in restraint of commerce "without exception or limitation," and not merely those "in which the restraint is unreasonable," are under the brand of the act of Congress; but in Addyston Pipe Company v. United States,[7] though the court does not change the real spirit of former cases, yet it modifies the breadth of their expression by the emphatic proposition that, to fall under the censure of the act, the agreement must "directly and substantially, and not merely indirectly, remotely, incidentally, regulate, to a greater or less degree, commerce among the states." To the same effect is Hopkins v. United States.[8] To condemn the agreement it is not necessary that it should be the explicit intent to affect commerce; for if the "natural and direct effect of such contract shall be, when carried out, to directly, and not as a mere incident to other and innocent purposes, regulate to any extent, interstate or foreign commerce," it comes under the act.

We must not here lose sight of the rule that as between individuals each has a right to compete with the other, to draw away his custom, to outstrip him in the race of con-

[6] 166 U. S. 290
[7] 175 U. S. 211
[8] 171 U. S. 578

testation, and even thereby ruin his fellowman; for that is freedom of business, of contract, of earning a living, freedom of competition. Every one has a right to enlarge his business, even though by means of greater capital, superior facilities and capacity he monopolizes business and ruins his competitor. If the business is lawful, even if it overshadow others, who can prevent it in a land of constitutional law, where the constitutions declare that there shall be liberty? Is there too much liberty in America? If so, blame these constitutions. The mere operation by lawful means of lawful business, however hurtful to others, is not actionable. It may cause damage, but it is damage without violation of another's right. Whatever one has a right to do, another can not have right to complain of. If one operator design to injure another in trade, that design will not prove him to be doing a wrong. "A lawful act is not actionable, though it proceeds from malicious motives."[9] Such a case is one of mere *damnum,* but it is *absque injuria.* We must nicely discriminate between *damnum* and *injuria.* We commonly use the words "injury" and "damage" as equivalents, but in the rule above stated these Latin words are wide apart. *Damnum* means only harm, damage; while *injuria* comes from *in,* against, and *jus,* right, and means something done against the right of the party, producing damage, and has no reference to the fact or amount of damage. Unless a right is violated, though there be damage, it is *damnum absque injuria.* There is no right better established under the

[9] Cooley, Torts, 830; Raycroft v. Tayntor, 33 L. R. A. 235; Glendon Iron Co. v. Uhler, 75 Pa. St. 467; Chipley v. Anderson, 11 Am. St. R. 370

law of business than the right of trade competition.[10] Thus small operators, individual or corporate, have no legal ground of complaint if large operators, by means of large capital, or by union of capital, outstrip and submerge them in the ocean of effort. The lion has stretched out his paws and grabbed in more prey than others; but that is the natural right of the lion in the field of pursuit and capture. Pity that the lion exists, his competing animals may say, his suffering prey may say, will say; but natural law accords the right; it is given him by the Maker for existence. But the moment the arrangements of capitalists wound the public by depressing trade, increasing prices of things necessary for the public, like commodities and transportation, or suppress competition, then those arrangements assume another cast, and come to be against public policy. The loudest outcry against corporations and trusts comes from those who are outstripped in the field of legitimate competition; but no free government can interfere between these competitors in the devouring race of pursuit and capture characterizing our day. It may be that our humble forefathers were happier in their frugal life than we, and applied the short span of time given man to better purpose. They moved from green pasture to green pasture watching their flocks, their chief dependence for food and raiment, and were not worn through every day's life with the heavy yoke of the railroad or corporation office, the banker's desk with his aching head and heart, the anxiety and burden of the president of the great insurance and manufacturing company.

[10] Mogul S. S. Co. v. McGregor, 21 Q. B. Div. 544.

It may be that the small business concerns of days that are no more, when wants and demands were few and competition slight, were preferable to the great business concerns of our days. It may be that our fathers were more honest and pure, free from the temptations of wealth and corruption. It may be that the lines of the poet contain the truth.

> Ill fares the land to hastening ills a prey,
> Where wealth accumulates and men decay.

Be this as it may, evolution has been all along forging its toilsome way. Population increased, demand increased. The human mind thought on, became educated, scientific. It begat the machine, and then one after another machine, saving labor, increasing production, cheapening articles. In time it came to pass that man wanted to conquer time and distance. Oceans were to be crossed with vessels of power to breast their winds and waves and overcome their great wastes. Continents, with broad rivers, high mountains, were to be spanned with railroads and bridges, that vast transportation from sea to sea, from place to place, might be accomplished. The continent's surface, the ocean's bed, were to know the telegraph, that human thought and intelligence might, in the twinkling of an eye, go from brother to brother thousands of miles away. These states of ours, so lately redeemed from the wilderness, had to be chequered with railroads, our rivers and lakes supplied with steamers, to accommodate the teeming millions of people. In this evolution it came to pass that man probed the bowels of earth with his drill to the depth of thousands of feet to bring out the light surpassing Aladdin's wonderful lamp; and he delved into the earth to produce the black diamond in unlimited quan-

tities to give cheer to winter's fireside, and move the engines of a world—that diamond beside which those of the Indian strand, with all their radiance, become dim. The national wealth had to be builded up by the nation's children to win in the giant struggle with other powers. Armies of war, armies of peace; navies of war, navies of peace had to be raised and supported. How could these mighty tasks be accomplished by small individual operators? What individual possessed enough? How could these things be done without great capital? Co-operation, which is corporation, union of owners of capital, was indispensable. This process of business of our day has some bad features about it, but under the law of compensation it has many good features. Whatever indidivuals may think, it has come to stay. It is the product of education, science, progress, civilization, invention, machinery. It is the child of evolution. Revolutions never go backward; they work their results infallibly. "The dead nations rise no more." Evolution never retraces its steps, because it is the energy of things. Like Longfellow's poetic youth, it bears the flag inscribed Excelsior, and climbs the Alps. It is the instrumentality of God, and can not fail. In this terrible march of pursuit some will perish by the way, "weary with the march of life." It is the law of the survival of the fittest. Who can help this death on the march? Who can save the failing ones? Who stretch forth the helping hand? Who help them to successful capture? No free government can. If it does so, it arrests the step of others equally entitled before the law with the failing ones. When, and only when, these gladiators in the arena so work as to affect the common-

wealth, the public, not individuals, can the state intervene; only when they combine to raise prices, to restrain trade as it concerns the entire public, or represses competition. Then the state can consistently with the Constitution step in.

Above we have given cases laying down general principles pertinent to this subject. They will point the way as lamps lighted by the highest authority. It may not be without benefit to cite some cases in which it was held that government could not interfere with this great right of contract under the word "liberty" found in the state and federal constitutions. A number of persons doing business at stockyards, some in Kansas, some in Missouri, in receiving stock from various states, feeding it and selling it for compensation, formed a voluntary association, and by its rules forbade its members buying stock from a commission merchant in Kansas City not a member of the association, fixed commissions for selling the stock, prohibited the employment of agents to solicit consignments, except upon stipulated salary, and prohibited any member from transacting business with any person violating the rules of the association. Each member was left free to carry on his individual business. The Supreme Court held that the business was not interstate commerce, and was not contrary to the act of Congress above referred to.[11] In another case[12] the association was very like the one just stated. The main difference was that the members of the association in the case now referred to were purchasers of cattle, while those in the former case

[11] Hopkins v. United States, 171 U. S. 578.
[12] Anderson v. United States, 171 U. S. 604.

were commission merchants selling them. The object of the association was, not for pecuniary profit, but to protect all interests connected with buying and selling live stock at the Kansas City stock yards, and to cultivate manly conduct towards each other, and give dignity to yard traders. The rules provided that the association would not recognize any yard trader, unless a member of it, and that no member should employ any person to buy or sell cattle unless he held a certificate of membership, and that no member should be allowed to pay any order buyer or salesman any sum of money as a fee for buying cattle from or selling cattle to such party. The Supreme Court did not feel called upon to decide whether the defendants were engaged in interstate commerce, because if they were the agreement was not one in restraint of that trade, nor was there any combination to monopolize, or attempt to monopolize, such trade within the meaning of the act of Congress, because it did not come within the meaning of the statute, which required that the direct effect of an agreement or combination must be in restraint of trade, but was simply entered into with the object of properly and fairly regulating the transaction of the business in which the parties were engaged

The American Sugar Refining Company owned a majority of the plants engaged in the business of refining sugar, and acquired by purchase four other refineries, giving it a practical monopoly of the business. It was held that the transaction created a monopoly, but it did not concern interstate commerce, and was not a violation of the act of July 2, 1890, because to fall under that act the transaction must create a monopoly in interstate commerce, and not merely a monopoly in the manufacture

of a necessary article of life, and this although the sugar was to be sent into other states.[13] Was this monopoly unlawful at common law as an act of engrossment? Was it violative of state law? The corporation did not combine with others to increase prices; but simply bought in other manufacturies. Why had it not the right to do so, even though the result was to control the supply? You may say that as it could not combine with other companies to control prices, it could not indirectly effect the same result by buying them out; but you must regard the right of purchase of those things in the line of its proper corporate business.

Some of the agreements or arrangements which have been held not to fall under the federal act would doubtless be condemned as illegal and contrary to the common law of the states as suppressing competition, raising prices and monopolizing trade. I have cited a number of leading state cases reflecting state decisions, commencing on page 372, touching this subject. I refer to the dissent of Justice Harlan in the case of United States v. E. C. Knight Company, just cited, in which he cites numerous state cases bearing on this subject. The case of Richardson v. Buhl[14] is a notable case where a corporation for the manufacture of matches was organized under an agreement to buy out other concerns engaged in the same line, so as to control the business by means of large capital and effect a monopoly. It was held void. The case of Morris Run Coal Company v. Barclay Company[15] is an-

[13] United States v. E. C. Knight Co., 156 U. S. 1.
[14] 77 Mich. 632.
[15] 68 Pa. St. 173.

other notable case holding void an agreement between coal companies dividing between themselves coal territory, because of their power under it to monopolize the market in coal. The cases are infinite on this subject and variant. It would answer no purpose to detail them here. Only general principles can be stated. The cases cited will point the way.

The commerce clause of the Constitution gives the national government original and plenary power to legislate upon the subject of interstate commerce, and the states are utterly without power to regulate such commerce by placing any burdens upon it, by restricting it, as held in many decisions.[16] This commerce clause thus operates in some measure to restrict the police powers of the state, as it does, to some extent, the right of contract. This is not a subject properly discussable in a work treating of the rights, privileges and immunities under the Fourteenth Amendment. Just how far the police power of the states, which was originally full and unlimited, has been curtailed by the commerce clause, is a question of great nicety, and the subject of many complicated Supreme Court decisions. The subject of when *transitus* of goods from state to state begins and ends, so as to be still under federal protection and above state action; the question as to what are commodities merchantable and lawful subjects of interstate commerce; when property sent from one state to another ceases to be in the original package of consignment and becomes commingled with the great mass of property within a state and subject to

[16] Brimmer v. Rebman, 138 U. S. 78, and authorities there cited.

its legislation, because no longer under federal protection; these and cognate questions will not be discussed in this work, because not pertinent to the Fourteenth Amendment. I will, however, call attention, for ready reference, to many authorities bearing on this question, to the able opinion of Mr. Justice Brown in the late case of Austin v. Tennessee, holding that tobacco must be recognized as a legitimate article of interstate commerce, though it may, to a certain extent, be within the police power of a state, and further holding that a state act restricting or prohibiting the sale of cigarettes is within the state power of police and not contrary to the commerce clause, provided it does not apply to original packages and makes no discrimination against cigarettes imported from other states, and provided there is no doubt that the statute is designed for protection of public health. The court held that packages of cigarettes, each 3 by 1 1-2 inches, containing ten cigarettes, without any shipping address on such packages, when they are taken from a loose pile of such packages at the factory by an express company in a basket which it furnished, in which it carries them and from which it empties them on the counter of a consignee in another state, do not constitute original packages of interstate commerce, but if there is any original package in the shipment, it is the basket.[17] Therefore these packages fell under state law, as mingled with the mass of the property of the state, and the state law prohibiting their sale was valid as applied to them. The

[17] 179 U. S. 343, 21 Sup. Ct. 132. Also May v. N. Orleans, 178 U. S. 496, 20 Sup. Ct. 976.

court was greatly divided. I call attention to the able majority and minority opinions as a lucid discussion of this intricate subject, and as referring to many cases shedding full light upon it.

As stated a few pages back, it is not within the purview of a work treating of rights, privileges and immunities under the Fourteenth Amendment to discuss in detail the elaborate subject of interstate commerce; but in connection with what has been said in this chapter it may be stated, in a few words, that a state can not prohibit the carriage into it, or the sale in it, in original packages of shipment or transportation, of articles or commodities that are legitimate subjects of commerce. A state can not do so, directly or indirectly, by express prohibition, by taxation, by inspection laws, or by any other process which restricts or burdens the freedom of interstate commerce. Articles inherently worthless and not merchantable property, or articles calculated to spread disease or detrimental to the public and unfit for human use, are not protected by the commerce clause.[18]

The power of Congress as to foreign and interstate commerce is not simply paramount, but it is exclusive over that of the states. Mere police regulations of states, though somewhat affecting commerce, are sustained; but not if they regulate commerce between states or with other nations.[19]

[18] *In re* Rahrer, 140 U. S. 545; Austin v. Tennessee, 179 U. S. 343, 21 Sup. Ct. 132; Leisy v. Hardin, 135 U. S. 100; Schollenberger, v. Pennsylvania, 171 U. S. 1.

[19] Leisy v. Hardin, 135 U. S. 100; Covington Bridge v. Kentucky, 154 U. S. 204.

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